82-1104

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GA TECHNOLOGIES INC.,
and GENERAL ATOMIC COMPANY,
Petitioners,

v.

UNITED NUCLEAR CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

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QUESTIONS PRESENTED

1. Whether the New Mexico State court which was held in *General Atomic Co.* v. *Felter*, 436 U.S. 493 (1978), to have no constitutional power to "interfere" with an arbitration protected by federal law may nullify that arbitration after it has been held by vacating the arbitrators' final award on the ground that the arbitrators had no authority except "to dismiss the proceedings."

2. Whether Section 10 of the Federal Arbitration Act permits a New Mexico State court

(a) to substitute its own judgment for that of the arbitrators on the question whether earlier proceedings of the New Mexico court were *res judicata* and entitled to full faith and credit; and

(b) to vacate an arbitration award entered in California.

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Petitioners GA Technologies Inc. and General Atomic Company (hereinafter "GAC")[1] respectfully pray that a writ of certiorari issue to review the judgment issued by the Supreme Court of the State of New Mexico in this case on September 15, 1982.

[1] GA Technologies Inc. is the successor in interest to General Atomic Company, a partnership that had been the party in interest from 1974 until October 29, 1982. On that date the partnership transferred essentially all its businesses, including, *inter alia*, General Atomic Company's contracts with United Nuclear Corporation and the arbitration awards involved in this case, to GA Technologies Inc., a newly formed California corporation wholly owned by Gulf Oil Corporation. A motion to substitute parties is being filed contemporaneously with this Petition. General Atomic Company is a partnership whose constituent partners are Gulf Oil Corporation and Scallop Nuclear Inc. Scallop is a subsidiary of the Royal Dutch-Shell Group.

OPINIONS BELOW

The opinion of the Supreme Court of New Mexico (Pet. App. A, pp. 1a-19a)[2] is reported at 651 P.2d 1277. The opinion, decision, and judgment of the District Court of Santa Fe County, New Mexico (Pet. App. B, pp. 20a-35a) are not reported.

JURISDICTION

The judgment of the Supreme Court of New Mexico was entered on September 15, 1982. GAC's timely motion for rehearing was denied by the New Mexico Supreme Court on October 4, 1982 (Pet. App. C, p. 36a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

STATUTE INVOLVED

Section 10 of the Federal Arbitration Act, 9 U.S.C. § 10, provides:

> § 10. Same; vacation; grounds; rehearing
>
> In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
>
> (a) Where the award was procured by corruption, fraud, or undue means.
>
> (b) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence

[2] The Appendices to this Petition are printed in a separate volume.

pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

STATEMENT

Introduction

In *General Atomic Co.* v. *Felter*, 434 U.S. 12 (1977) (*"Felter I"*), and *General Atomic Co.* v. *Felter*, 436 U.S. 493 (1978) (*"Felter II"*), this Court reversed unconstitutional New Mexico State court orders that had prohibited GAC from pursuing arbitration under the Federal Arbitration Act of a multi-million-dollar dispute with United Nuclear Corporation ("UNC"). Following these decisions, arbitration was held in San Diego, in the Southern District of California. The arbitration panel issued partial and final arbitration awards in GAC's favor. Pet. Apps. D and E, pp. 37a-135a. The New Mexico State court has now vacated the final award on the ground that judgments of that court, issued while GAC was unlawfully enjoined from exercising its federal arbitration rights, finally resolved all disputes between GAC and UNC and left nothing to arbitrate. The New Mexico court disregarded the fact that this very contention had been submitted by both parties to arbitration and squarely rejected by a majority of the arbitrators. With its holding, the New Mexico court reduced GAC's "absolute right to present its claims to federal forums" (436 U.S. at

497)—which this Court had twice vindicated—to a meaningless right of "access" to a federal forum that, according to the New Mexico court, had no authority to consider or decide any issue whatever.

1. Arbitration Is Unconstitutionally Barred.

On December 31, 1975, UNC sued GAC in a New Mexico State court seeking to void a long-term contract in interstate commerce under which UNC was to supply GAC with 25 million pounds of uranium. This agreement included an arbitration clause providing for compulsory arbitration of "any disputes, which may arise between the parties during the course of" the contract. In March 1976, before an answer to the complaint had to be filed, GAC formally expressed its intention to arbitrate with UNC pursuant to this provision. At UNC's request, the trial court promptly issued a preliminary injunction prohibiting, *inter alia*, "the institution or prosecution of . . . arbitration proceedings." The injunction remained in effect, notwithstanding GAC's appeals, until 18 months later when, in October 1977, this Court held that GAC had "every right to attempt . . . under . . . the Federal Arbitration Act" to defend itself by bringing UNC into "federal arbitration proceedings." *Felter I*, 434 U.S. at 18.

On the day after the New Mexico trial court vacated its injunction as a result of this Court's decision in *Felter I*, GAC filed a demand for arbitration in San Diego, California, of its dispute with UNC and moved simultaneously for a stay of the then ongoing State court proceedings pending that arbitration.[3] The New Mexico court denied

[3] The recitation of the history of this litigation in the opinion of the New Mexico Supreme Court is not an even-handed one. Illustrative is the court's description of GAC's demand for arbitration. The court said in its opinion (Pet. App. A, p. 4a):

GAC's motion and granted a cross-motion by UNC for a "stay" of the San Diego arbitration. These orders were based principally on a ruling that GAC had waived its right to arbitrate by failing to demand arbitration while the injunction prohibiting arbitration had been in effect.

GAC asked this Court to issue a writ of mandamus on the ground that the "stay" of arbitration violated this Court's mandate in *Felter I*. While GAC's petition was pending (and thus while the "stay" of arbitration remained in effect), the New Mexico trial court, citing GAC's alleged noncompliance with discovery orders, entered a default judgment declaring void the uranium supply contract which contained the arbitration clause.[4]

Twenty-three months after the filing of the complaint and one month into the trial on the merits, GAC moved to stay the trial, alleging that it had started arbitration proceedings in San Diego. Surely the New Mexico court could not fairly report that the demand for arbitration came 23 months after the complaint was filed and one month after trial began without also noting that until the day before that demand an injunction held illegal by this Court had prohibited any demand for arbitration outside New Mexico. Other factual and legal deficiencies in the opinion of the New Mexico Supreme Court were enumerated in GAC's motion for rehearing in that court and in GAC's supporting brief, which are reproduced as Pet. App. F, pp. 136a-151a.

[4] Both the judgment declining a stay of the New Mexico proceedings pending arbitration and the default judgment were subsequently affirmed by the New Mexico Supreme Court. This Court denied further review. *United Nuclear Corp.* v. *General Atomic Co.*, 93 N.M. 105, 597 P.2d 290, *cert. denied*, 444 U.S. 911 (1979) (denial of stay); *United Nuclear Corp.* v. *General Atomic Co.*, 96 N.M. 155, 629 P.2d 231 (1980), *app. dismissed and cert. denied*, 451 U.S. 901 (1981) (default judgment).

On May 30, 1978, with full knowledge of the default judgment, this Court reversed the New Mexico court's order "staying" arbitration. This Court's opinion held that in granting UNC this "stay" (436 U.S. at 496):

> the Santa Fe court has again done precisely what we held that it lacked the power to do: interfere with attempts by GAC to assert in federal forums what it views as its entitlement to arbitration.

This Court also held that the New Mexico court had no "power" to "interfere" with GAC's efforts to obtain arbitration, "on the ground that GAC is not entitled to arbitration or for any other reason whatsoever." 436 U.S. at 497. The Court concluded that GAC had "an absolute right to present its claims to federal forums," including arbitration pursuant to the Federal Arbitration Act. *Id.*

2. The Arbitration Is Held.

After the New Mexico court's second interference with arbitration was removed as a result of this Court's mandate, each party designated an arbitrator, and the parties' designees picked Justice Walter V. Schaefer, formerly Chief Justice of the Supreme Court of Illinois, as the chairman and neutral arbitrator.[5] UNC appeared before the arbitrators, filed a "protest," and argued to the panel, *inter alia*, that the New Mexico judgments entered while the illegal injunction was in effect were *res*

[5] UNC filed two lawsuits in federal district courts in New Mexico and California seeking to stop the arbitration and arguing that arbitration was precluded by the *res judicata* effect of the New Mexico judgments. Both courts ruled that UNC's *res judicata* claims were appropriate for decision by the arbitrators. See note 9, *infra*.

judicata so as to bar the arbitration and that GAC had waived arbitration.

The panel received briefs from both parties and conducted several days of hearings, in which both parties participated, in San Diego in March 1979. In November of that year, the majority issued a Partial Award resolving in GAC's favor the *res judicata* and waiver issues that UNC had raised. Pet. App. D, pp. 37a-66a. On the issue of *res judicata*, Justice Schaefer and W. Willard Wirtz (GAC's designated arbitrator) said in their opinion that UNC's arguments did not "address the unique full faith and credit question which this matter presents: What effect is to be given to a judgment entered by a state court after it has unlawfully barred a litigant from pursuing the federal remedy to which he is entitled?" *Id.* at 56a. Citing substantial precedent, the panel majority said it was "inescapable" (*id.* at 59a):

> that the Santa Fe Court lacked jurisdiction to proceed after it had unlawfully issued its injunction which prohibited GAC from exercising its Federal remedy . . . . Unless judgments of the Supreme Court of the United States are to be treated as meaningless gestures, the subsequent proceedings of the Santa Fe court were, in the language of the Supreme Court, "coram non judice," and they are not entitled to full faith and credit.

The panel then scheduled hearings on the merits to be held in San Diego in June 1980. On the eve of these hearings, UNC advised that it would not participate further, and UNC's designated arbitrator submitted his resignation. After recessing for one week to give UNC an opportunity to rejoin the proceeding, the remaining members of the panel continued with the hearings in accordance with the applicable rules of the American Arbitration Association. GAC offered oral and documen-

tary evidence for two weeks, and the panel required GAC not only to present a case-in-chief but also to respond to UNC's previously enumerated defenses.

On September 12, 1980, the two remaining members of the panel filed a comprehensive Final Award (Pet. App. E, pp. 92a-135a) in San Diego. The Final Award sustained GAC's contract claim and rejected UNC's defenses. The arbitrators awarded GAC damages for uranium deliveries UNC had failed to make, and ordered specific performance of UNC's future obligations.[6]

3. The Final Award Is Nullified.

In an effort to set aside the Partial and Final Awards, UNC returned to the New Mexico trial court that had illegally enjoined arbitration and had entered the default judgment against GAC. Rather than filing a new action to vacate the award as authorized in Section 10 of the Federal Arbitration Act, it filed "Petitions for Supplemental

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[6] GAC filed two actions for confirmation of the awards in California, but in neither action was the awards' validity decided. The United States District Court for the Southern District of California dismissed GAC's confirmation action on the ground that there was no federal subject-matter jurisdiction over the case. *See General Atomic Co.* v. *United Nuclear Corp.*, 655 F.2d 968 (9th Cir. 1981), *cert. denied*, 102 S.Ct. 1449 (1982). GAC's California State court confirmation action was terminated when the intermediate appellate court issued a writ of mandate ruling that the trial court could not exercise personal jurisdiction over UNC. *United Nuclear Corp.* v. *Superior Court*, 113 Cal.App.3d 359, 169 Cal. Rptr. 827 (1980), *cert. denied*, 454 U.S. 878 (1981). Contrary to the suggestion of the court below (Pet. App. A, p. 13a), these decisions are not *res judicata* of the validity of GAC's awards, since neither addressed any issue on the merits. Both were jurisdictional rulings.

Relief" in its prior action seeking to have the awards vacated and declared void. GAC responded, *inter alia*, (1) that such an order would violate this Court's rulings in *Felter I* and *Felter II;* (2) that the awards could be vacated only on grounds enumerated in Section 10 of the Federal Arbitration Act, and (3) that under Section 10 of the Act, the New Mexico courts had no authority to vacate or otherwise invalidate arbitration awards entered in the Southern District of California.

On January 9, 1981, the New Mexico trial court rejected GAC's contentions and vacated the Final Award. The court held that its own 1977 order refusing a stay of its proceedings was a "declaration" that GAC had waived its arbitration rights and that the dispute was not arbitrable, and that the legal effect of this "declaration" was "that any agreement to arbitrate no longer existed; it vanished, disappeared" (Pet. App. B, p. 25a). It also held that the default judgment—entered while the injunction against arbitration was in effect—meant that "there was no contract" and hence "no agreement to arbitrate." *Id.* On this basis the trial court substituted its own legal judgment for the conclusion of the arbitrators on the *res judicata* issue. Although the trial court invoked the language of Section 10(d) at the conclusion of its decision (*id.* at 27a, 32a), it did not actually apply the Act's enumerated standards. It simply dismissed Justice Schaefer's reasoned decision as "unfathomable sophistry," an attempt to "review and reverse the New Mexico Supreme Court," and "at best . . . a heedless disregard for the fundamental principles of American jurisprudence." *Id.* at 25a-27a.

The New Mexico Supreme Court affirmed the trial court's judgment vacating the Final Arbitration Award. It read this Court's decisions in *Felter I* and *Felter II* as

entitling GAC only to meaningless "access" to federal forums, which were obliged immediately to terminate their proceedings out of respect for the New Mexico court judgments *entered while arbitration had been unconstitutionally enjoined.* The New Mexico court stated that GAC's "substantive rights had all been concluded with final and binding judgments before the arbitration board handed down its award" and that these judgments established that "there was never anything to arbitrate" (Pet. App. A, pp. 5a, 11a).

The New Mexico Supreme Court brushed aside the facts that the *res judicata* issue had been submitted to the arbitrators by UNC, that UNC had told the arbitrators that they had the "power" to decide the issue, and that it had been decided by the arbitrators, in a detailed and reasoned opinion, in GAC's favor. While it echoed the trial court's conclusion that the arbitrators had exceeded their jurisdiction (*id.* at 11a), the New Mexico Supreme Court merely reaffirmed its own earlier holdings and overrode, on this ground alone, the judgment rendered by the arbitrators. It did not consider Justice Schaefer's Partial Award or evaluate the arbitrators' *res judicata* decision in light of Section 10.

Nor did the New Mexico court pause long over the provision in Section 10 specifying that "the United States court in and for the district wherein the award was made" could vacate an arbitration award. It held that it was "apparent that Section 10 relates to venue and not to jurisdiction" and that, while this provision limits the venue of federal courts, it is "not applicable to state courts." *Id.* at 16a. On this basis the New Mexico court reached beyond the borders of New Mexico to vacate the outcome of an arbitration that was conducted pursuant to the Federal Arbitration Act in California and that had resulted in an award made in California.

REASONS FOR GRANTING THE WRIT

The decision below culminates the obstruction of federal remedies which the New Mexico courts began with the unconstitutional injunction against arbitration in April 1976 and continued with the unconstitutional "stay" of arbitration in December 1977. This Court's decision in *Felter I* removed the first of these unlawful obstructions; its decision in *Felter II* set aside the second. The Court should act now to undo the New Mexico courts' attempt to achieve *after the arbitration* the very same result which they unconstitutionally sought to achieve by enjoining and staying the arbitration before it could begin.

Important issues of federalism are at stake. If the New Mexico courts are right, this Court's decisions in *Felter I* and *Felter II* accorded GAC (and other parties which may be subject to similar unlawful orders in the future) no substantive right whatever. The distinguished arbitrators who considered and resolved the issues presented to them by the parties were participants in a shadow play that could be treated by UNC and by the New Mexico courts as if it had never happened. This result makes a hollow shell of rights guaranteed by federal law and of the constitutional assurance of the Supremacy Clause.

In addition, serious and recurring questions concerning the administration of the Federal Arbitration Act were erroneously decided by the New Mexico courts. Subject only to the limited review allowed by Section 10, the Act grants conclusive authority to arbitrators' decisions on questions such as the *res judicata* defense to arbitration raised by UNC. The New Mexico courts cavalierly preempted that authority. They ignored the arbitrators' decision and rode roughshod over the precise limitations on judicial power prescribed by Section 10 of the Act. And by exempting State courts from the geographical limitations

imposed by Section 10, the New Mexico courts have cleared the way for intense forum-shopping in all future arbitrations conducted under Federal law.

I

THE NEW MEXICO COURTS MISUNDERSTOOD AND MISAPPLIED FELTER I AND FELTER II

GAC came to this Court between 1976 and 1978 as a victim of the New Mexico courts' unconstitutional interferences with its right to invoke federally-guaranteed remedies. Applying the Supremacy Clause principle that had been established in *Donovan* v. *City of Dallas*, 377 U.S. 408 (1964), this Court vindicated GAC's "right to pursue federal remedies and take advantage of federal procedures and defenses in federal actions." 434 U.S. at 18-19. During the time it took to secure this Court's rulings in *Felter I* and *Felter II*, the New Mexico courts entered orders and judgments which, they now claim, extinguished GAC's federal remedies before they could be pursued. If these events are permitted to stand as a basis for denying GAC meaningful arbitration under federal law, the Supremacy Clause doctrine established by *Donovan* v. *City of Dallas* becomes illusory. The course has then been charted for the denial of federal rights and remedies in every similar case. A party need only secure an injunction from a State court prohibiting resort to federal remedies and, while that injunction is being appealed, rush to judgment on the merits of the dispute, so that it can subsequently invoke that judgment as *res judicata* permanently to defeat the federal right.

The primary issue discussed by the New Mexico Supreme Court was the meaning of this Court's decisions in *Felter I* and *Felter II*. That court announced its view of "what *Felter I* did not do," emphasized its understanding of "[t]he whole impact of the opinion [in *Felter I*]," de-

scribed what it believed this Court "did not do in *Felter II*," and gave its interpretation of "[a] fair reading of the two *Felter* opinions" with an analysis of their "main thrust." It said that this Court's "mandates in *Felter I* and *Felter II* are narrow," and read the decisions as prohibiting only interference *in advance* with a federal arbitration, not as barring State court orders issued *after* the arbitration which "interfere" just as effectively with the arbitration remedy. Pet. App. A, pp. 3a-5a, 10a-11a.

This Court should review this case to correct the New Mexico court's meaningless distinction between a pre-arbitration injunction and a post-arbitration invalidation. That distinction undermines the important constitutional principle announced by the Court in *Felter I* and *Felter II*. Rather than prohibiting only a denial of "*access* to federal arbitration" (Pet. App. A, p. 10a, emphasis added), this Court's 1977 and 1978 decisions held that New Mexico courts "lacked the power to . . . *interfere with* attempts by GAC to assert in federal forums what it views as its entitlement to arbitration" (436 U.S. at 496, emphasis added). This was emphasized when this Court repeated that *Felter I* had "held that the Santa Fe court is without power under the United States Constitution *to interfere with* efforts by GAC to obtain arbitration in federal forums . . ." (436 U.S. at 497, emphasis added), and found it "inconceivable that upon remand from this Court the Santa Fe court was free *to again impede* GAC's attempt to assert its arbitration claims in federal forums" (436 U.S. at 497, emphasis added). "Interfering" and "impeding" can be accomplished as effectively by vitiating the results of an arbitration as by preventing it in the first place.[7] When this Court sustained GAC's "absolute right

[7] This Court has noted in another context that a declaratory judgment can "interfere" as effectively with a proceeding in another

to present its claims to federal forums" (436 U.S. at 497), it was surely not authorizing the eradication of that "absolute right" by an after-the-fact decision that the federal forum had no power to do anything except dismiss the claims being presented to it.[8]

Donovan v. *City of Dallas*, 377 U.S. 408 (1964), the precedent on which both *Felter I* and *Felter II* relied, establishes that the New Mexico court's understanding of the *Felter* decisions was erroneous. In *Donovan*, a State court had enjoined prosecution of a federal action on the ground that a State court judgment growing out of the controversy was *res judicata*. This Court reversed because of the Supremacy Clause. It did not hold that the prevailing party was entitled only to "access" to a federal court, which would then have to dismiss the action on *res judicata* grounds. In order to give meaning to the right to

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forum as an injunction prohibiting that proceeding. In *Samuels* v. *Mackell*, 401 U.S. 66, 73 (1971), this Court said:

> Ordinarily . . . the practical effect of the two forms of relief will be virtually identical, and the basic policy against interference with pending state criminal prosecutions will be frustrated as much by a declaratory judgment as it could be by an injunction.

[8] This Court's refusal in *Felter II* to go beyond the issues presented on mandamus and to vacate the New Mexico court's denial of a stay of its trial was not, as the New Mexico Supreme Court believed, a recognition of that court's authority to declare the arbitration void. Pet. App. A, pp. 10a-11a. This Court discerned that the refusal to stay the trial was not in itself a violation of the earlier mandate, so that it could not be the subject of a writ of mandamus. (*See* Justice Schaefer's discussion of this point in his Partial Award, Pet. App. D, pp. 47a-49a.) And this Court was certainly not authorizing the New Mexico court to invalidate the arbitration on the ground that the completed New Mexico proceedings were valid and forever binding.

prior State court judgment, this Court held that "whether or not a plea of *res judicata* in the second suit would be good *is a question for the federal court to decide.*" 377 U.S. at 412 (emphasis added).

In this case, UNC's claim of *res judicata* was, under *Felter I* and *Felter II*, a question for the federal arbitrators to decide. As UNC itself told the arbitrators in its written memorandum to the panel:

> The significance of the U.S. Supreme Court opinion *[Felter II]* concerning the disputes between UNC and GAC is apparent in light of the case of *Donovan* v. *City of Dallas*, 377 U.S. 408 (1964), which holds that claims of *res judicata* (or full faith and credit, for that matter) must be pressed before the tribunal where the suit pends (which UNC is doing before this Panel). . . .

After receiving briefs and hearing argument from both parties, the arbitrators did decide UNC's claims in GAC's favor. Just as Donovan's federal right would have lost all significance had the Texas State court in *Donovan* v. *City of Dallas* been permitted to decide whether its own prior judgment was to be *res judicata*, so is GAC robbed of its federal right if New Mexico has the last word on the binding effect of decisions rendered by its courts while they were blocking GAC's federal remedy with unconstitutional orders.

II

THE NEW MEXICO COURTS MISAPPLIED SECTION 10 OF THE FEDERAL ARBITRATION ACT

Two federal-law issues of substantial and recurring importance relating to the Federal Arbitration Act are also presented by the New Mexico court's decision. The sole legal authority to vacate an arbitration award is Section 10 of the Federal Arbitration Act, 9 U.S.C. § 10.

That provision of law carefully limits the power of a court reviewing arbitration awards to very specific grounds. The language and policy of the Act do not permit courts to engage in free-wheeling re-examinations of issues committed by the parties' agreement to resolution by arbitrators. Nor does Section 10 grant reviewing jurisdiction to a court in any district other than the one where the arbitration award was entered. Both of these issues are important and deserve plenary consideration.

A. Section 10 Bars A Court From Substituting Its Judgment For The Arbitrators' On An Issue, Such As The Res Judicata Effect Of Prior State-Court Judgments, Which The Arbitrators Had Power To Decide.

The New Mexico Supreme Court affirmed the trial court's decision that earlier New Mexico judgments "were final, the law of the case, *res judicata* and entitled to full faith and credit" (Pet. App. A, p. 14a). This judicial conclusion conflicted squarely with the conclusion which had been reached by a majority of the arbitration panel in its Partial Award after it had considered the issues argued by both parties in briefs and in extensive oral presentations.

(1) *The Arbitrators' Power.*—The broad language of the parties' arbitration clause committed to the arbitrators all legal and factual disputes arising "during the course of" the uranium supply agreement. This Court's decision in *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), makes it clear that arbitrators have jurisdiction, under such a clause, to determine even issues affecting the validity of the contract in which the clause is found. In this case UNC told the arbitrators, "[Y]ou have the jurisdiction and power to decide whether [the New Mexico judgments] . . . are *res judicata*. . . . You have the power, you have the jurisdiction." And two

federal district judges also said in related litigation that the arbitrators had jurisdiction to decide this question.[9]

(2) *The Limits on a Reviewing Court.*—Since the *res judicata* question was within the jurisdiction of the arbitrators, they did not "exceed their powers" for purposes of Section 10(d) of the Federal Arbitration Act by deciding that question. The arbitrators' decision could therefore be vacated by a court *only* on grounds such as "corruption, fraud, or undue means" or "evident partiality in the arbitrators," none of which was involved in this case. The New Mexico Supreme Court and the trial court paid lip service to the "excess of power" standard in Section 10(d), but the basis for their decision was clearly and simply their disagreement with the arbitrators' conclusion on the *res judicata* effect of the prior judgments. In this respect, the New Mexico Supreme Court's opinion

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[9] In 1978, shortly before the arbitration began, the United States District Court for the District of New Mexico ruled in a proceeding brought by UNC to stop the arbitration that "the language of the arbitration clause in the disputed contract appears broad enough to allow the arbitrators to hear" the issue of *res judicata*. *United Nuclear Corp.* v. *American Arbitration Ass'n*, No. 78-522-B (D.N.M. Sept. 27, 1978) (Bratton J.). After the arbitration panel had issued its Partial Award, the United States District Court for the Southern District of California referred with approval to this holding and stated (*United Nuclear Corp.* v. *General Atomic Co.*, No. 79-329-E (S.D. Cal. May 7, 1980) (Enright, J.)):

> The parties have submitted [UNC's *res judicata* claim] to the arbitration panel in San Diego and have received an opinion, demonstrating that the alternative forum [arbitration] is indeed available and being utilized.

These unreported decisions are reproduced as Pet. App. G and Pet. App. H, pp. 152a-165a.

conflicts with numerous decisions by federal courts that strictly limit judicial review of arbitration awards. *See, e.g., National R.R. Passenger Corp.* v. *Chesapeake & Ohio Ry.*, 551 F.2d 136, 152 (7th Cir. 1977); *Aerojet-General Corp.* v. *American Arbitration Ass'n*, 478 F.2d 248, 252 (9th Cir. 1973); *Saxis Steamship Co.* v. *Multifacs International Traders, Inc.*, 375 F.2d 577, 581-82 (2d Cir. 1967).

Federal courts have expressly recognized that questions of *res judicata* are no different from any other issue that is within the jurisdiction of arbitrators. *Boston & Maine Corp.* v. *Illinois Central Railroad Co.*, 396 F.2d 425 (2d Cir. 1968), *aff'g* 274 F. Supp. 257 (S.D.N.Y. 1967); *Refino* v. *Feuer Transportation, Inc.*, 480 F. Supp. 562 (S.D.N.Y. 1979), *aff'd*, 633 F.2d 205 (2d Cir. 1980). In the *Boston & Maine* case, the court reviewed the decision of an arbitration panel not to give binding effect to an earlier State judgment. Writing for a unanimous panel of the Second Circuit, Judge Friendly observed that if the court were to consider that question *de novo*, it would be "disposed to" rule the other way. 396 F.2d at 425. He concluded, however, that the parties were "bound by" the arbitrators' decision. 396 F.2d at 426.[10]

(3) *The Public Policy.*—It is essential to the proper implementation of the Federal Arbitration Act that

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[10] The *Refino* case also concerned an arbitrator's ruling on a claim of *res judicata*. The district judge said (480 F. Supp. at 567):

> [E]ven if the arbitrator erroneously applied the doctrine of *res judicata* to the JLC decision, there would still be no basis for vacating the award. "It is a truism that an arbitration award will not be vacated for a mistaken interpretation of law." *Sobel* v. *Hertz, Warner & Co.*, 469 F.2d 1211, 1214 (2d Cir. 1972).

courts not be permitted freely to substitute their judgment on legal issues for the judgment of arbitrators. If this limitation is not followed, "the ostensible purpose for resort to arbitration, *i.e.*, avoidance of litigation, would be frustrated." *Amicizia Societa Navegazione* v. *Chilean Nitrate & Iodine Sales Corp.*, 274 F.2d 805, 808 (2d Cir. 1960). The New Mexico courts have jeopardized the efficacy of the arbitration remedy with the decision they have rendered in this case. Consequently, this Court should review the New Mexico judgment and reverse it so that the applicable standards of review under Section 10 will be clear and unequivocal.

B. A New Mexico Court May Not Vacate An Arbitration Award Made In California.

Section 10 of the Federal Arbitration Act confers the authority to vacate an arbitration award on "the United States court in and for the district wherein the award was made." The New Mexico Supreme Court held that this provision did not preclude it from invalidating awards made in the Southern District of California, ruling that Section 10's "provisions limit federal court venue but are not applicable to state courts" (Pet. App. A, p. 16a). To our knowledge, this is the first time in the 57-year history of the Federal Arbitration Act that any court, State or federal, has ever so held.

Unless reversed, this ruling will create an anomaly that will threaten the simplicity and efficacy of the scheme that the Federal Arbitration Act establishes for review of arbitration awards. Federal courts have uniformly held that only a court specified in Section 10 (a court "in and for the district wherein the award was made") may vacate an award. The Act prohibits vacation of an award by all courts outside the district where the award was made,

including even a court which had jurisdiction over the underlying controversy, or courts which had previously ruled on a motion for a stay under Section 3 or on a motion to compel arbitration under Section 4. *United States* v. *Ets-Hokin Corp.*, 397 F.2d 935 (9th Cir. 1968); *City of Naples* v. *Prepakt Concrete Co.*, 490 F.2d 182 (5th Cir.), *cert. denied*, 419 U.S. 843 (1974); *see Arthur Imerman Undergarment Corp.* v. *Local 162, ILGWU*, 145 F. Supp. 14, 18 (D.N.J. 1956); *Long* v. *Marion Manufacturing Co.*, Civ. No. 74-659 (D.S.C. March 11, 1976) (reproduced in Appendix I to this Petition, pp. 166a-173a). The New Mexico Supreme Court has now established the principle that State courts need not honor this limitation. Under the view of the New Mexico courts, a party seeking to escape enforcement of an arbitration award may select the most favorable forum among the 50 State court systems, subject only to such limitations on personal jurisdiction and venue as States apply to any civil action.

The central purpose of the Federal Arbitration Act is to "allow parties to avoid 'the costliness and delays of litigation.'" *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 510-11 (1974). The New Mexico Supreme Court's interpretation of Section 10 undermines this purpose. It will encourage forum-shopping, races to judgment among coordinate courts, and efforts by courts to enjoin proceedings in other jurisdictions.

The New Mexico Supreme Court advanced no reason why Congress would have chosen an anomalous scheme for judicial review in which the power to vacate arbitration awards subject to the Act would be limited to only one designated federal court "in and for the district wherein the award was made," while a party could take

the same request to any State court in the country.[11] This Court should correct the error of the New Mexico courts and thereby protect parties in federal arbitrations and State courts from the forum-shopping and judicial rivalry which is likely to ensue if this decision stands.

[11] This anomaly is rendered more striking in light of the authority to remove a case to federal court under 28 U.S.C. § 1441. If the losing party in an arbitration attempts to vacate the award in a State court in a jurisdiction other than where the award was made and the prevailing party removes the suit, the federal court in the second jurisdiction will face the choice of reviewing the award notwithstanding the limitation of Section 10 or dismissing the suit notwithstanding its proper removal.

CONCLUSION

For the foregoing reasons, this Court should grant GAC's Petition for a Writ of Certiorari.

Respectfully submitted,

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DECEMBER 1982

No. 82-1104

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

GA TECHNOLOGIES INC.,
and GENERAL ATOMIC COMPANY,

Petitioners,

v.

UNITED NUCLEAR CORPORATION,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of New Mexico

MOTION TO SUBSTITUTE PARTY

The petitioners in this case seek review of a judgment of the Supreme Court of New Mexico concerning two arbitration awards issued in connection with a dispute over the enforceability of a long-term uranium supply agreement. Throughout the prior proceedings in this matter, petitioner General Atomic Company had been the party in interest. It was assigned the underlying uranium supply agreement in 1974, instituted the arbitration at issue in this case in its name, and participated as the party of record in proceedings in the Supreme Court of New Mexico and the New Mexico trial court.

However, on October 29, 1982, after the judgment below was entered, General Atomic Company transferred essentially all

of its businesses, including, inter alia, its contracts with United Nuclear Corporation and the arbitration awards involved in this case, to GA Technologies Inc., a newly formed California corporation wholly owned by Gulf Oil Corporation. As a result of this transaction, GA Technologies Inc. has become the party in interest in this action. Accordingly, petitioners respectfully move that GA Technologies Inc. be substituted in the place and stead of General Atomic Company and be permitted to proceed as a petitioner in this proceeding. See Feener Business Schools v. Speedwriting Publishing Co., 249 F.2d 609 (1st Cir. 1957); United States v. F. D. Rich Co., 437 F.2d 549, 552 (9th Cir. 1971). Cf. Rule 40 of the Rules of this Court.

Respectfully submitted,

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82-1104

No. ____

IN THE
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OCTOBER TERM, 1982

GA TECHNOLOGIES INC.,
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Petitioners,

v.

UNITED NUCLEAR CORPORATION,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

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APPENDIX A

UNITED NUCLEAR CORPORATION,
Plaintiff-Appellee,
v.
GENERAL ATOMIC COMPANY,
Defendant-Apellant.

No. 13536.

Supreme Court of New Mexico.

Sept. 15, 1982.
Rehearing Denied Oct. 4, 1982.

Rodey, Dickason, Sloan, Akin & Robb, Albuquerque, Montgomery & Andrews, Seth D. Montgomery, Santa Fe, Miller, Cassidy, Larroca & Lewin, Howrey & Simon. Washington, D.C., for defendant-appellant.

Bigbee, Stephenson, Carpenter, Crout & Olmsted, Harry L. Bigbee, Donnan Stephenson, Santa Fe, for plaintiff-appellee.

OPINION

EASLEY, Chief Justice.

This complex billion-dollar dispute between United Nuclear Corporation (UNC) and General Atomic Company (GAC) has been in and out of numerous forums from coast-to-coast. An outline of the whole tangled procedural history would fill a sizeable book. We confine the recitation of facts as closely as possible to those that are material to a decision on the narrow issues raised in this, the most recent of two dozen or so times the case has been considered in our Court.

In this part of the controversy GAC appeals a decision of the Santa Fe District Court (the Santa Fe court) declaring void a

California arbitration award favorable to GAC, and affirming the prior judgments favorable to UNC. The issues are:

1. Whether the decisions of the United States Supreme Court in *General Atomic Co.* v. *Felter*, 434 U.S. 12, 98 S.Ct. 76, 54 L.Ed.2d 199 (1977) (*Felter I*) and *General Atomic Co.* v. *Felter*, 436 U.S. 493, 98 S.Ct. 1939, 56 L.Ed.2d 480 (1978) (*Felter II*) prohibit the Santa Fe court from acting to void the arbitration award and affirm the prior judgments.

2. Whether the Santa Fe court had jurisdiction to void the arbitration award made in California under the Federal Arbitration Act procedures, on the grounds that the arbitration board had a duty to invoke the doctrine of *res judicata* and to give full faith and credit to our previous final decisions on all the issues raised in the arbitration hearings.

3. Whether the Federal Arbitration Act, 9 U.S.C. Sections 1-14 (1976), prevents the trial court from voiding the award.

4. Whether UNC's claim for supplemental relief is cognizable under the New Mexico Declaratory Judgment Act, Sections 44-6-1 to -15, N.M.S.A.1978.

GAC contends the Santa Fe court's decision exceeds its jurisdiction under federal law, violates the mandates in *Felter I* and *Felter II*, conflicts with the Federal Arbitration Act, and violates the declaratory judgment rules.

On the other hand, UNC claims that the trial court's decision conforms in all details with the mandates in *Felter I* and *Felter II*. UNC further urges that the arbitration award was void under the doctrine of *res judicata* since the prior final decisions of this Court, which were denied certiorari by the United States Supreme Court, held that there was no agreement to be arbitrated. These decisions hold that GAC, by its own actions, forfeited any right to arbitrate and that the dispute was so enmeshed with antitrust claims as to preclude arbitration. UNC further defends that the arbitrators exceeded their authority and manifestly disregarded the outstanding final judg-

ments and other applicable law and, moreover, that making claim for supplemental relief under the Declaratory Judgment Act was the proper procedure.

In 1975, UNC sued GAC in a declaratory judgment action to invalidate a uranium contract (1973 Supply Agreement). The Santa Fe court granted a preliminary injunction restraining GAC from "filing or prosecuting any other action * * * in any other forum * * *," including "arbitration proceedings." We note here that the trial court *did not* restrain GAC from filing a motion in the Santa Fe court to stay the trial pending arbitration or from filing a motion to order arbitration. We affirmed the decision of the trial court. *General Atomic Co.* v. *Felter*, 90 N.M. 120, 560 P.2d 541 (1977), *rev'd*, *Felter I*. The United States Supreme Court on accepting the case on certiorari held that the injunction violated the supremacy clause in that it kept GAC from seeking relief in federal forums. *Felter I*.

GAC takes the position that every action taken by the Santa Fe court and every decision rendered in favor of UNC by this Court and the United States Supreme Court from the time the unconstitutonal injunction was entered should be declared void and of no effect. The argument is that but for the erroneous restraint GAC could have sought arbitration, and that by the time the restraint was lifted, the adverse final judgments on the merits had already been issued.

However, in *Felter I* the United States Supreme Court noted that GAC had announced that it desired to defend itself by impleading UNC in federal lawsuits and federal arbitration proceedings then being pursued by utility companies, which were not parties to our case. "This, of course, is something which GAC has every right to *attempt* to do under Fed.Rule Civ.Proc. 14 and the Federal Arbitration Act." *Felter I supra*, 434 U.S. at 18, 98 S.Ct. at 79 (emphasis added) (footnote omitted). The Court held that GAC's "right to pursue federal remedies and take advantage of federal procedures and defenses in federal actions" could not be restricted by a state court. *Felter I*, *supra*, at 18-19, 98 S.Ct. at 79, citing *Donovan*

v. *City of Dallas*, 377 U.S. 408, 84 S.Ct. 1579, 12 L.Ed.2d 409 (1964).

We consider what *Felter I* did not do, in light of the claims of GAC that the trial court's recent decision violated the mandate in *Felter I*. The United States Supreme Court did not accept GAC's argument that the Santa Fe court had no jurisdiction to proceed on the merits. In fact, the opinion says that "the case is remanded to that court for further proceedings not inconsistent with this opinion." *Felter I*, *supra*, 434 U.S. at 19, 98 S.Ct. at 79.

The whole impact of the opinion is that the Santa Fe court could not impede the access of GAC to federal forums. Thus, the Santa Fe court was left free to proceed to address the merits of the case, as it did. There is no other reasonable interpretation of the language in *Felter I* that supports GAC's claim that the case precluded the Santa Fe court from making the most recent decisions.

In the meantime, the Santa Fe court proceeded with the trial of the case. Twenty-three months after the filing of the complaint and one month into the trial on the merits, GAC moved to stay the trial, alleging that it had started arbitration proceedings in San Diego. The Santa Fe court denied the motion and entered an order enjoining the San Diego arbitration, stating that enmeshed antitrust issues precluded arbitration, and that in any event, GAC had waived its right to arbitrate.

While its appeal on this decision in our Court was pending, GAC sought mandamus in the United States Supreme Court to set aside the judgment enjoining arbitration and the judgment determining that the claims were not arbitrable. The United States Supreme Court granted the petition but only insofar as it pertained to the injunction, and held that the Santa Fe court had done "precisely what we held that it lacked the power to do: interfere with attempts by GAC to assert in federal forums what it views as its entitlement to arbitration." *Felter II*,

supra, 436 U.S. at 496, 98 S.Ct. at 1940 (footnote omitted). The Court stated further:

> Clearly, our prior opinion did not preclude the court from making findings concerning whether GAC had waived any right to arbitrate or whether such a right was contained in the relevant agreements. Nor did our prior decision prevent the Santa Fe court, on the basis of such findings, from declining to stay its own trial proceedings as requested by GAC pending arbitration in other forums. But, as demonstrated *supra*, we have held that the Santa Fe court is without power under the United States Constitution to interfere with efforts by GAC to obtain arbitration in federal forums on the ground that GAC is not entitled to arbitration or for any other reason whatsoever. GAC, as we previously held, has an absolute right to present its claims to federal forums.

Felter II, *supra*, at 496-97, 98 S.Ct. at 1940-41.

We note what the United States Supreme Court did not do in *Felter II*. Although GAC insisted that the Santa Fe court was without jurisdiction, that all the issues were subject to arbitration, that there was no waiver, and that the contract was valid, the United States Supreme Court did not so hold. GAC further argues that the "rationale" of the *Felter* opinions from the United States Supreme Court precludes this Court from giving any consideration to numerous final judgments on all issues, and from making any decision whatsoever regarding GAC's arbitration rights, and that the Santa Fe court violated that "rationale" by declaring the arbitration award void.

A fair reading of the two *Felter* opinions discloses that the main thrust is that the state court cannot deny GAC "access" to a federal forum. There are no comments by the United States Supreme Court bearing on the validity of the substantive rights asserted, in the event GAC gained access to a particular forum. Here the substantive rights had all been concluded with final and binding judgments before the arbitration board handed down its award.

On appeal to this Court, GAC made the same arguments it is asserting here, that the mandates of *Felter I* and *Felter II*

precluded the state court from deciding that it had jurisdiction, that the claims were unarbitrable, and that there was a waiver of arbitration. This Court especially rejected these claims by GAC after analyzing in considerable detail the bodies of law from throughout the United States on each of the subject matters.

We affirmed the decision of the Santa Fe court that the court had jurisdiction to decide the question of arbitrability of the issues, that the antitrust issues were so enmeshed in the whole case that none of the questions were subject to arbitration, and that the actions of GAC constituted a waiver of its right to arbitration. *United Nuclear Corp.* v. *General Atomic Co.*, 93 N.M. 105, 597 P.2d 290, *cert. denied*, 444 U.S. 911, 100 S.Ct. 222, 62 L.Ed.2d 145 (1979) (our 1979 opinion).

GAC petitioned the United States Supreme Court for certiorari, contending, among other things, that the erroneous April 2, 1976 injunction had barred GAC from demanding arbitration and that the December 27, 1977 judgment, finding that there were no arbitrable issues as a matter of law and that GAC had waived its right to arbitrate, violated the *Felter* case mandates. GAC's petition was denied. *General Atomic Co.* v. *United Nuclear Corp.*, 444 U.S. 911, 100 S.Ct. 222, 62 L.Ed.2d 145 (1979).

At this point the decision on the material issues raised in the instant proceeding became "graven in stone," as UNC claims:

1. The Santa Fe court had jurisdiction.

2. Arbitration was totally out of the picture since antitrust issues are not arbitrable and were inextricably mixed with other questions.

3. GAC had forfeited its right to arbitration by failing to take steps to preserve that right.

4. The *Felter* opinions were not violated by our decisions on the above issues.

One would think the arguments on these items were set at rest. Not so. GAC found reasons to assert the same claims

through numerous later proceedings. After GAC's motion for stay of proceedings was denied, the Santa Fe court entered an order imposing sanctions and a default judgment in favor of UNC against GAC, holding that GAC was guilty of "utmost bad faith" in refusing to comply with discovery orders. A later judgment held that the 1973 Supply Agreement was void and performance thereunder was excused.

On August 29, 1980, this Court affirmed in all material respects, holding that the 1973 Supply Agreement was void under the antitrust doctrine of "contract illegality," and that its enforcement would violate the public policy of this state. *United Nuclear Corp.* v. *General Atomic Co.*, 96 N.M. 155, 200, 629 P.2d 231, 276 (1980), *cert. denied*, 451 U.S. 901, 101 S.Ct. 1966, 68 L.Ed.2d 289 (1981) (our 1980 opinion).

GAC sought to appeal to the United States Supreme Court both this Court's August 29, 1980 judgment and (for the second time) this Court's 1979 opinion holding the dispute nonarbitrable, again contending that all proceedings after April 2, 1976, violated the *Felter* decisions and were void. The appeal was dismissed, and certiorari was denied. *General Atomic Co.* v. *United Nuclear Corp.*, 451 U.S. 901, 101 S.Ct. 1966, 68 L.Ed.2d 289 (1981).

GAC had made application to the American Arbitration Association (AAA) to arbitrate this dispute in San Diego. On November 30, 1977, GAC moved the Santa Fe court to stay the trial that was in progress in order to pursue arbitration. However, GAC never asked the Santa Fe court or any other court for an order compelling arbitration pursuant to Section 4 of the Federal Arbitration Act. Although AAA had announced that it would hold the arbitration demand in abeyance until final resolution on the arbitrability by an appropriate court, proceedings were commenced and UNC was directed to appoint its arbitrator. UNC filed suit in the United States District Court for the District of New Mexico to enjoin arbitration on the basis of the New Mexico judgment. The complaint was dismissed for lack of subject matter jurisdiction. *United Nuclear Corp.* v. *Gener-*

al Atomic Co., No. Civ. 80-845-HB (D.N.M. Dec. 11, 1980). UNC proceeded with the arbitration under protest, but withdrew its arbitrator before a final decision was reached.

In an effort to enjoin the arbitration, UNC sued GAC, the AAA, and the arbitrators in the United States District Court for the Southern District of California. That suit was dismissed for lack of subject matter jurisdiction. Judge Enright stated that the New Mexico courts were the most appropriate forum to give effect to the New Mexico judgment, adding: "In summary, plaintiff appears to have come to the wrong court for the relief it seeks. The courts of the State of New Mexico have the primary right and duty to enforce their judgments." *United Nuclear Corp.* v. *General Atomic Co.*, No. 79-329-E, slip op. at 5 (S.D.Cal. July 9, 1979).

UNC appealed Judge Enright's decision to the United States Court of Appeals for the Ninth Circuit. That court denied UNC's motion for an injunction and in an order filed June 6, 1980, held that the validity of the arbitration could later be reviewed in state court, explaining:

> However, there appears to be nothing to prevent appellant from seeking injunctive relief from a state court against arbitration that has not been compelled by a federal court. *Cf. General Atomic Co.* v. *Felter*, 436 U.S. 493, 496-97 [98 S.Ct. 1939, 1940-41, 56 L.Ed.2d 480] (1978); *General Atomic Co.* v. *Felter*, 434 U.S. [12] at 18 & n. 11 [98 S.Ct. 76 at 79 & n. 11, 54 L.Ed.2d 199] (1977). Nor does it appear that appellant's contentions as to the effect of the judgments of the New Mexico state courts are insulated from eventual judicial review. *Cf.* 9 U.S.C. sections 9-11.

United Nuclear Corp. v. *General Atomic Co.*, No. 80-5229 (9th Cir. June 6, 1980) (order denying emergency motion for an injunction pending appeal).

On September 10, 1980, after this Court had affirmed the default judgment against GAC (our 1980 opinion), the two remaining members of the arbitration panel filed their Final Award holding against UNC on all material issues and granted GAC $301,181,635 in damages.

GAC sued for confirmation of the award in the United States District Court for the Southern District of California. Judge Enright dismissed GAC's suit for lack of subject matter jurisdiction. *General Atomic Co.* v. *United Nuclear Corp.*, 655 F.2d 968, 969 (9th Cir. 1981), *aff'g* No. Civ. 80-1585-E (S.D. Cal. Oct. 24, 1980), *cert. denied*, ___ U.S. ___, 102 S.Ct. 1449, 71 L.Ed.2d 662 (1982). GAC appealed to the Ninth Circuit, which affirmed on September 8, 1981. *Id.*

UNC petitioned the Santa Fe court for supplemental relief and asked that the arbitration award be vacated. On motion by UNC this Court appointed Judge Musgrove to handle further matters in the case.

After Judge Enright's dismissal of its suit, GAC sued for confirmation of the arbitration awards in the Superior Court of the State of California, which denied UNC's motion to dismiss for lack of *in personam* jurisdiction. UNC petitioned the Court of Appeals of the State of California for a writ of mandate, and that court directed dismissal of the case. *United Nuclear Corp.* v. *Superior Court*, 113 Cal.App.3d 359, 169 Cal.Rptr. 827 (1980), *cert denied*, 454 U.S. 878, 102 S.Ct. 358, 70 L.Ed.2d 187 (1981). That court held the arbitration clause in the 1973 Supply Agreement could not furnish the basis for jurisdiction, since it had been held void by decisions of the New Mexico courts, which "are entitled to full faith and credit." *Id.* at 360-61, 169 Cal.Rptr. at 828.

The California Supreme Court denied GAC's motion to enjoin the pending proceedings in the Santa Fe court and denied GAC's petition for hearing as to the California Court of Appeals decision. *United Nuclear Corp.* v. *Superior Court*, No. 4 Civ. 24286 (Cal.Sup.Ct., Feb. 18, 1981) (order denying hearing). GAC petitioned for certiorari in the United States Supreme Court to review the California Court of Appeals decision. GAC asserted that the California court had violated the supremacy clause and failed to implement the intent of the two *Felter* cases. The Supreme Court refused to take the case. *General Atomic Co.* v. *United Nuclear Corp.*, 454 U.S. 878, 102 S.Ct. 358, 70 L.Ed.2d 187 (1981).

GAC removed the supplemental proceedings in the Santa Fe court to the United States District Court for the District of New Mexico, which held that the removal was improper since there was no basis for federal subject matter jurisdiction, and remanded the case to the Santa Fe court. *United Nuclear Corp.* v. *General Atomic Co.*, No. Civ. 80-845-HB (D.N.M. Dec. 11, 1980).

After hearing UNC's petition for supplemental relief on the merits, Judge Musgrove affirmed prior decisions in this case that hold:

1. The contract containing the agreement to arbitrate was void in its entirety.

2. There are nonarbitrable antitrust issues so entwined with other issues that arbitration is precluded, even if there were a valid contract to arbitrate.

3. Assuming, *arguendo*, that there is a valid contract to arbitrate and that antitrust issues do not bar arbitration, GAC still forfeited any rights to arbitration by failing to timely assert them.

4. The above decisions, any one of which disposes of this case on the merits, do not conflict with the United States Supreme Court's rulings in the *Felter* cases.

The Santa Fe court concluded also that the arbitrators had exceeded their jurisdiction and acted in manifest disregard of the law, and thus, the award was void. GAC appeals to this Court.

1. Conflicts with Felter I and Felter II.

The United States Supreme Court mandates in *Felter I* and *Felter II* are narrow. They simply prohibit our state courts from specifically barring GAC's access to federal arbitration in order to assert its rights. This cannot be enlarged to mean that federal arbitration is the exclusive remedy. The express language in *Felter II* recognizes the jurisdiction of the Santa Fe court to pass on the questions of whether there is an arbitrable

contract, a waiver of arbitration, or a right to a stay of trial pending arbitration. Th decision on these basic issues control the disposition of this case.

Additionally, the language of the opinions cannot be interpreted to mean that a void arbitration award, which has been denied confirmation by both state and federal courts in California, must be validated by our state court even though numerous final judgments in our courts establish its invalidity.

In this latest proceeding, the Santa Fe court held that the arbitrators exceeded their authority and manifestly disregarded the law, stating:

> By some unfathomable sophistry the two arbitrators concluded that all proceedings in the New Mexico District Court and the New Mexico Supreme Court after April 2, 1976, were void or to use their words, "*coram non judice.*" They reached that conclusion even though there is not the slightest hint that the United States Supreme Court intended such a result in the prior opinions. [*Felter* cases.]

Whether there was a valid contract to arbitrate and whether there were any arbitrable issues were threshold questions. There being nothing to arbitrate, there is no substance to GAC's main claim that it would have been able to seek arbitration but for the illegal injunction. The United States Supreme Court in *Felter II* stated that its prior opinion in *Felter I* "did not preclude the [Santa Fe] court from making findings concerning whether GAC had waived any right to arbitrate or whether such a right was contained in the relevant agreements." *Felter II*, *supra*, 436 U.S. at 497, 98 S.Ct. at 1941.

We held in our 1979 opinion that GAC had no right whatsoever to arbitration. This is a final judgment with *res judicata* effect. It cannot be collaterally attacked by a claim that the Santa Fe court's invalid order had barred federal arbitration. The lynch-pin is that there was never anything to arbitrate. The effect of GAC's argument is that all our decisions on the merits should be "nullified" because GAC delayed asserting claims that were patently invalid from the outset. We cannot accept such convoluted reasoning. We again affirm the trial court's decision on this issue.

2. Res Judicata and Law of the Case.

If ever a court decision were etched in bronze, it would be the one holding that *Felter I* and *Felter II* did not prevent our state courts from deciding all the material issues in this case. *United Nuclear Corp.* v. *General Atomic Co.*, (our 1979 opinion), *supra*. Like a yo-yo, this question has been propelled to and fro innumerable times between lower courts and the United States Supreme Court. Each time the result has been a rejection of GAC's claims. If the doctrines of *res judicata* and law of the case still have efficacy under our law, this issue has been adequately set at rest.

The lengthy history of the prior proceedings in this case demonstrates that each material issue before us has been answered, not once, but several times. These final judgments conclusively establish that the Santa Fe court had jurisdiction to hold that the contract was void, and thus, there was no arbitration agreement; that even if there had been a valid contract to arbitrate, GAC had voluntarily waived its rights; and that, in any event, none of the disputes were arbitrable because of enmeshed antitrust issues. Notwithstanding these prior final judgments, two arbitrators held to the contrary on each specific issue. However, GAC's efforts to get the arbitration award confirmed by California state and federal courts were rejected all the way to the United States Supreme Court. These judgments are final.

The doctrine of *res judicata* is firmly planted in New Mexico's jurisprudence. When there are identical parties, causes of action, subject matter, and capacity of the parties, the first judgment bars relief in a second case. *City of Santa Fe* v. *Velarde*, 90 N.M. 444, 564 P.2d 1326 (1977). The doctrine applies to a declaratory judgment action. *Lamonica* v. *Bosenberg*, 73 N.M. 452, 389 P.2d 216 (1964); *see also Savage* v. *Howell*, 45 N.M. 527, 118 P.2d 1113 (1940) (declaratory judgment conclusively declares the preexisting rights of the litigants). It also applies to a judgment entered as a discovery sanction. *Chalmers* v. *Hughes*, 83 N.M. 314, 491 P.2d 531 (1971).

The doctrine of "law of the case" is applicable. *See Ute Park Summer Homes Association* v. *Maxwell Land Grant Co.*, 83 N.M. 558, 560, 494 P.2d 971, 973 (1972) (doctrine of law of the case long recognized in New Mexico). This doctrine holds that "[i]f an appellate court has considered and passed upon a question of law and remanded the case for further proceedings, the legal question so resolved will not be determined in a different manner on a subsequent appeal." *Id.* This doctrine controls even though the first ruling was in error. *Gerety* v. *Demers*, 92 N.M. 396, 589 P.2d 180 (1978).

The California Court of Appeals decided that the San Diego Superior Court had no jurisdictional basis upon which to confirm the arbitration award, that the New Mexico Supreme Court had held the agreement to arbitrate void, and that the latter's decisions are entitled to full faith and credit. *United Nuclear Corp.* v. *Superior Court, supra.* The United States Supreme Court denied certiorari. Similar treatment was given GAC's claims in the federal court system, in which they were rejected all the way to the United States Supreme Court. These judgments have *res judicata* effect as to GAC's claims. *See Napper* v. *Anderson, Henley, Shields, Bradford & P.*, 500 F.2d 634 (5th Cir. 1974), *cert. denied*, 423 U.S. 837, 96 S.Ct. 65, 46 L.Ed.2d 56 (1975); *see also Chandler* v. *O'Bryan*, 445 F.2d 1045, 1057 (10th Cir. 1971), *cert. denied*, 405 U.S. 964, 92 S.Ct. 1176, 31 L.Ed.2d 241 (1972) (when district judge considered all questions raised on his hearing of removal of state libel suit and determined that case should be remanded for state court trial, that decision was *res judicata* on issue of forum). This holds true in the face of somewhat conflicting language in decisions by Judge Bratton and Judge Enright regarding the authority of the arbitration board to decide the issues of *res judicata* and full faith and credit.

GAC has steadfastly maintained that only a court in the district in which the award is made has jurisdiction to confirm or vacate the award. GAC has now exhausted all possibilities for confirmation, according to its theory, and there is no further avenue open for UNC to seek to vacate the award.

The Santa Fe court further held that upon this Court's affirmance of the December 27, 1977 judgment, "[t]he issues of waiver, nonarbitrability and no inconsistency with the United States Supreme Court decisions were final, the law of the case *res judicata* and entitled to full faith and credit. * * *" We agree and affirm the decision of the trial court.

3. Jurisdiction of the Santa Fe Court to Declare the Arbitration Award Void.

GAC asserts that the Federal Arbitration Act, 9 U.S.C. Sections 1-14, controls this action to the exclusion of the laws of New Mexico and the final judgments of our courts. GAC relies upon Section 10 of the Federal Arbitration Act to support its claim:

> In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration. * * *

9 U.S.C. Section 10 (1976).

GAC says this must be read as either a preemptive jurisdictional or venue statute; and in either case only a federal or state court "in and for the district wherein the award was made," *id.*, can vacate it. By conceding that a state court in the district where the award is made may vacate it, GAC has weakened its claim that there must be strict compliance with the statute, which mentions only "United States" courts.

UNC claims that the section does not mention jurisdiction, venue or ousting state courts; that it does not mandate that *only* the federal court has jurisdictional or venue status to vacate an award; and thus, UNC urges that the statute does not preempt the jurisdiction or venue of state courts. UNC alleges that the section may delimit federal court jurisdiction but does not delimit state court venue or jurisdiction.

In *United Nuclear Corp.* v. *General Atomic Co.*, No. Civ. 80-845-HB (D.N.M. Dec. 11, 1980), Judge Bratton held that in the absence of diversity of citizenship or a federal question the

federal court did not have subject matter jurisdiction of this dispute under Section 10 of the FAA. He remanded the case to the Santa Fe court. In *General Atomic Co.* v. *United Nuclear Corp.*, No. Civ. 80-1585-E (S.D.Cal. Oct. 24, 1980), Judge Enright ruled the same way in an action by GAC under 9 U.S.C. Section 9 to confirm the award. The United States Court of Appeals for the Ninth Circuit affirmed, stating:

> GAC argues that subject matter jurisdiction for confirmation of an arbitration award arises from the very language of section 9. We disagree, however, and feel that such an interpretation would work great mischief to the overall scheme of the Arbitration Act. In particular, that interpretation presents a significant possibility of eviscerating the clear limits on federal jurisdiction contained in sections 3 and 4. GAC's expansive interpretation would mean, for example, that a district court lacking jurisdiction to compel arbitration under section 4 might nonetheless threaten to confirm a subsequent *ex parte* award under section 9. Such a threat would have a substantial compulsory effect. We cannot approve an interpretation which would achieve by indirection that which Congress has clearly forbidden.

General Atomic Co. v. *United Nuclear Corp.*, 655 F.2d 968, 969 (9th Cir. 1981), *cert. denied*, ___ U.S. ___, 102 S.Ct. 1449, 71 L.Ed.2d 662 (1982).

In *United Nuclear Corp.* v. *Superior Court*, *supra*, the California Court of Appeals ordered dismissal of GAC's confirmation application under 9 U.S.C. Section 9 for lack of jurisdiction.

UNC urges that the Act does not confer federal jurisdiction or create the basis for federal question jurisdiction under 28 U.S.C. Section 1331. Numerous federal courts have examined sections of the Act and have so held. *E.g.*, *Commercial Metals Co.* v. *Balfour, Guthrie, & Co.*, 577 F.2d 264 (5th Cir. 1978); *Monte* v. *Southern Delaware County Authority*, 321 F.2d 870 (3d Cir. 1963); *Ballantine Books, Inc.* v. *Capital Distributing Co.*, 302 F.2d 17 (2d Cir. 1962); *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959), *cert. dismissed*, 364 U.S. 801, 81 S.Ct. 27, 5 L.Ed.2d 37 (1960).

Subject matter jurisdiction should be determined not with respect to individual sections of the Act but with respect to the Act as a whole. *See Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198, 201, 76 S.Ct. 273, 275, 100 L.Ed. 199 (1965); *Robert Lawrence Co., supra.* In discussing this issue, the Court of Appeals for the Fifth Circuit stated:

> The Arbitration Act was enacted as a single comprehensive statutory scheme. To engage in the reasoning the plaintiff suggests [that Section 2 may be construed to be independent of Section 4] would in effect repeal Section 4 of the Act.

Commercial Metals Co. v. *Balfour, Guthrie & Co., supra*, at 268-269 (citations omitted).

Section 4 of the Act confines jurisdiction to compel arbitration to courts that would have jurisdiction under 28 U.S.C. Section 1331, that is, federal subject matter jurisdiction. *Bangor and Aroostock R. R.* v. *Maine Central R. R.*, 359 F. Supp. 261 (D.D.C.1973); C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure; Jurisdiction Section 3569 (1975). *See also Hoiness* v. *United States*, 335 U.S. 297, 301-02, 69 S.Ct. 70, 72, 93 L.Ed. 16 (1948); *Bainbridge* v. *Merchants & Miners Co.*, 287 U.S. 278, 280, 53 S.Ct. 159, 77 L.Ed. 302 (1932); *Panama R. R.* v. *Johnson*, 264 U.S. 375, 44 S.Ct. 391, 68 L.Ed. 748 (1924).

A congressional intent to establish exclusive jurisdiction in the federal courts is not to be lightly inferred. *Dowd Box Co.* v. *Courtney*, 368 U.S. 502, 82 S.Ct. 519, 7 L.Ed.2d 483 (1962). Jurisdiction in the state court must be affirmed "where it is not excluded by express provision, or by incompatibility in its exercise arising from the nature of the particular case." *Claflin* v. *Houseman*, 93 U.S. 130, 136, 23 L.Ed. 833 (1876).

Considering Section 10 in light of *Hoiness* v. *United States, supra*, and *Bainbridge* v. *Merchants & Miners Co., supra*, it is apparent that Section 10 relates to venue and not to jurisdiction. Its provisions limit federal court venue but are not applicable to state courts.

The Santa Fe court concluded that the arbitrators had no jurisdiction to issue an award and that in failing to give full faith and credit to the New Mexico decisions, the arbitrators acted in manifest disregard of the law and in excess of their powers.

"Like a contract, an arbitration award that is contrary to law will not be enforced." *Johns-Manville Sales Corp.* v. *International Association of Machinists*, 621 F.2d 756, 758 (5th Cir. 1980) (footnote omitted). In his book entitled "The Law and Practice of Commercial Arbitration," Martin Domke concurs:

> A challenge may further be based on the alleged illegality of the award, based on the assertion that the award is against the public policy of the forum, which prevents its validity and calls for its elimination even as an unconfirmed award. Reasons for such a challenge of the award may be found, of course, in the unenforceability of the agreement where the arbitration clause as such cannot be validly maintained, the violation of price ceiling provisions or of the Security and Exchange Act, and usurious transaction.

M. Domke, The Law and Practice of Commerical Arbitration Section 33.03, at 308 (1968) (footnote omitted).

The public policy of New Mexico demands that our trial courts enforce final judgments instead of overriding those judgments with void arbitration awards. Our public policy also precludes our courts from enforcing arbitration agreements contained in contracts that the courts find were totally void from their inception.

The award in this case was further contrary to the law and against public policy, since the arbitrators ruled on antitrust issues not subject to arbitration. *See United Nuclear Corp.* v. *General Atomic Co.* (our 1979 opinion), *supra*.

There is no question about the finality of the judgments of our courts. When the arbitrators failed to consider these judgments, which were controlling over the disposition of the issues before the arbitration board, it stands to reason that our Court must vacate the conflicting award. *See Telephone Work-*

ers Union v. *New Jersey Bell Telephone Co.*, 450 F. Supp. 284 (D.N.J.1977), *aff'd* 584 F.2d 31 (3rd Cir. 1978); *Garlick Funeral Homes, Inc.* v. *Local 100, Service Employees International Union*, 413 F. Supp. 130 (S.D.N.Y.1976).

4. Applicability of Declaratory Judgment Act.

GAC argues that the relief granted here is not proper under the Declaratory Judgment Act, Section 44-6-9, N.M.S.A.1978. It claims that the Santa Fe court considered facts that arose after the first declaratory judgment was rendered and that since the relief was not coercive, that section does not apply. No legal authorities were cited to support these contentions.

Section 9 of the Act provides that supplemental or "further relief based on a declaratory judgment" may be granted. *Id.* Supplemental relief may be based upon subsequent facts. *See Lyle* v. *Luna*, 65 N.M. 429, 338 P.2d 1060 (1959).

The federal Declaratory Judgement Act is similar in all material respects to ours. At 6A J. Moore, Moore's Federal Practice Paragraph 57.10 (2d ed. 1982) it is stated:

> An entirely different situation is presented where the right to coercive relief accrues *subsequent* to the filing of the complaint, and thus could not have been previously asserted. There is here no reason to bar the plaintiff from seeking coercive remedy, and if the right asserted is germane to the declaration that has been issued, redress may be had by ancillary proceedings for supplemental and further relief under the provisions of 28 USC Section 2202, which provides:
>
> "Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment." (footnote omitted) (emphasis in original).

Moore also explains that the relief need not be coercive and may be entirely declaratory. *Id.*; Restatement (Second) Judgments Section 33 comment c (1980). We conclude that the supplemental pleadings properly raised contested issues that called for declaratory relief.

GAC urges that no action should have been taken by the Santa Fe court prior to the issuance of a mandate in the appeal to this Court from the August 29, 1980 default ruling. However, that point was decided by us against GAC after the matter was specifically considered on September 22, 1980, on motion by UNC that a trial judge be appointed to hear any remaining issues. This Court ruled that a judge should be appointed and thereafter designated one. It is implicit in this action that this Court held that it was not necessary for a mandate to issue in the case on appeal before supplemental relief could be considered. The supplemental proceedings here come within the rule permitting collateral proceedings necessary to give effect to a judgment pending appeal. Pending appeal, a trial court retains jurisdiction to enforce an unsuperseded judgment. *See* Section 44-6-9, N.M.S.A. (1978). *Prudential Insurance Co. of America* v. *Anaya*, 78 N.M. 101, 107, 428 P.2d 640, 646 (1967). *See* E. Borchard, Declaratory Judgments (2d ed. 1941), at 429.

The judgment of the trial court is affirmed.

IT IS SO ORDERED.

SOSA, Senior Justice, and PAYNE, J., concur.

APPENDIX B

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
STATE OF NEW MEXICO, COUNTY OF SANTA FE

No. 50827

UNITED NUCLEAR CORPORATION, *Plaintiff,*

v.

GENERAL ATOMIC COMPANY, ET AL, *Defendants,*

INDIANA & MICHIGAN ELECTRIC COMPANY, *Third-party Defendants.*

Opinion

(Filed January 9, 1981)

This matter is before the Court on plaintiff's, United Nuclear Corp. (UNC), petition for supplemental relief pursuant to Section 9 of the New Mexico Declaratory Judgment Act, Section 44-6-9 N.M.S.A. 1978, and Section 10 of the Federal Arbitration Act 9 U.S.C. 10 seeking a declaration that the arbitration proceedings were barred by the earlier judgments of this Court and vacating the arbitration awards.

Defendant, General Atomic Co. (GAC), filed its response claiming that this Court lacks jurisdiction, improper venue, improper service and that the petitions fail to state a claim upon which relief can be granted.

There is one thing that can be said of this case with a great deal of certainty. There will be no end until all the issues are gathered together, presented to and decided by some court of last resort. For some time the case has been on parallel courses with the courts on one course and an arbitration panel on the other. This is the first time the courses have converged presenting an opportunity for its final trek to appellate review.

JURISDICTION. This Court has had jurisdiction of the parties and subject matter since December 31, 1975. On April 2,

1976, this Court denied GAC's motion to dismiss this action for lack of personal jurisdiction. On October 15, 1976, the New Mexico Supreme Court affirmed. *United Nuclear Corp.* v. *General Atomic Co.*, 90 N.M. 97, 560 P2d 161. That issue was final and became the law of this case. No claim of lack of subject matter jurisdiction was made since the District Court is a court of general jurisdiction and the dispute arose from a contract between the parties. Art. VI, Sec. 13 New Mexico Constitution. The parties agree that state courts and federal courts have concurrent jurisdiction under the Federal Arbitration Act. *Commercial Metals Co.* v. *Balfour, Guthrie & Co.*, 577 F. 2d 264 (5th Cir. 1978). This Court has jurisdiction in this case to apply the Federal Arbitration Act. *United Nuclear Corp.* v. *General Atomic Co.*, 93 N.M. 105, 597 P2d 290, certiorari denied, 44 U.S. 911. That is the law of this case. This Court is bound by that law. The claim of lack of jurisdiction is without merit.

VENUE. This case was originally filed pursuant to the New Mexico Declaratory Judgment Act, Section 44-6-1 et seq. N.M.S.A. 1978. A judgment was entered by this Court on December 27, 1977. Section 8 of the Act mandates the Court to grant further relief based on a declaratory judgment when necessary or proper. Plaintiff has requested this Court for a declaration determining what, if any, effect the action of the arbitration panel has on the prior judgment. Venue is nothing more than the proper location of the forum to hear the case. It is a general rule that actions must be tried where brought unless the venue is changed. *Peisker* v. *Chaney*, 46 N.M. 159, 123 P2d 726. The same applies to supplementing a judgment previously entered. Venue is proper for consideration of further relief pursuant to Section 44-6-9 N.M.S.A. 1978.

Counsel have cited no cases directly stating that a state court considering affirmation or vacation of an arbitration award has to be in the district where the award was made nor have they cited any cases stating that it does not have to be in the district where the award was made.

Section 9 of the Federal Arbitration Act dealing with confirmation of the award states in part —

> "If no court is specified in the agreement of the parties then such application may be made to the United States Court in and for the district within which such award was made."

Section 10 of the Act dealing with vacation of the award states in part —

> "In either of the following cases the United States Courts in and for the district wherein the award was made may make an order vacating the award —"

GAC argues that only a court, Federal or State, in the Southern District of California where the purported arbitration occurred can affirm or vacate the award. An action was filed by GAC in the United States District Court for the Southern District of California to confirm the award. *General Atomic Co.* v. *United Nuclear Corp.*, Case No. 80-1585-E (Sept. 9, 1980). The case was dismissed for lack of subject matter jurisdiction. The case met the same fate in the United States District Court in New Mexico, *United Nuclear Corp.* v. *General Atomic Co.*, Civ. No. 80-845HB (December 11, 1980). GAC filed an application to confirm the award in the Superior Court for San Diego County, California. *General Atomic Co.* v. *United Nuclear Corp.*, Case No. 560547. The Fourth Appellate Division, California Court of Appeals dismissed the action in the Superior Court. *United Nuclear Corp.* v. *Superior Court of the State of California for the County of San Diego*, 4 Civ. No. 24286 (December 16, 1980). Judge Brown dismissed the case for lack of jurisdiction. Judge Brown also held the prior judgments and decisions of the New Mexico court were entitled to full faith and credit. Even if there had been no jurisdiction question that Court would have stayed the California case until this Court entered a judgment under the doctrine of forum non conveniens. As the matter now stands, if GAC's argument were correct, the arbitration award would remain in perpetual limbo. In Sec-

tions 9 and 10 of the Federal Arbitration Act the words "may be made" and "may make an order" are permissive rather than mandatory. Had Congress intended to restrict such action to a particular locale stronger language would have been used. *Allison, Inc.*, v. *Menikin Storage, Inc.*, 452 F. Supp. 573 (1878).

The venue of this Court to consider the arbitration award pursuant to the Federal Arbitration Act is proper.

SERVICE. Service of the petitions requesting supplemental relief and vacation of the arbitration award was made by mailing to opposing counsel in conformity with Rule 5 of the New Mexico Rules for Civil Procedure. The same parties and same counsel are now as they have been in the past. A plethora of pleadings have been enchanged in the same manner. GAC used the petitions as a basis for removal of this case to Federal Court which was then remanded. Counsel was frank to admit there was no real difference whether the petitions were handed to him by the postman or a marshal. To hold otherwise would be to elevate form over substance. Service was proper in this case.

FAILURE TO STATE A CLAIM. GAC argues that the petitions fail to state a claim upon which relief can be granted, to the extent that they seek review of the arbitration awards other than as contemplated by Section 10 of the Federal Arbitration Act.

In considering the motion to dismiss for failure to state a claim for which relief can be granted, all facts well pleaded must be accepted as true and the motion may be granted only when it appears the plaintiff cannot be entitled to relief under any state of facts provable under the claim. *Runyan* v. *Jaramillo*, 90 N.M. 629, 567 P2d 478.

The petitions clearly state the grounds of the claim for relief: that the arbitrators exceeded their powers or imperfectly executed them. The petitions also state factual and legal matters in support of those claims. If the matters pleaded in the petitions are accepted as true the plaintiff is entitled to the

relief requested. The claim of failure to state a claim is without merit.

THE ARBITRATION. A petition for a declaratory judgment on a contract between UNC and GAC was filed in this Court on December 31, 1975. On December 27, 1977, this Court entered a decision and judgment denying GAC's motion to stay proceedings and declared that GAC had waived any right it may have had to arbitration; that the issues of New Mexico antitrust violations were not arbitrable; that all other issues were so intertwined with the antitrust issue none were arbitrable. An interlocutory appeal was taken by GAC. On May 7, 1979, in *United Nuclear Corp.* v. *General Atomic Co.*, 93 N.M. 105, 597 P2d 290, the New Mexico Supreme Court affirmed the judgment as to waiver and nonarbitrability and held that the trial court's decision and judgment were not inconsistent with the two United States Supreme Court decisions, *General Atomic Co.* v. *Felter*, 434 U.S. 12 and 436 U.S. 493, arising out of this case. The United States Supreme Court denied certiorari. *General Atomic Co.* v. *United Nuclear Corp.*, 444 U.S. 911.

On May 18, 1978, the New Mexico Supreme Court issued a mandate to this Court for such further proceedings as may be proper.

The issues of waiver, nonarbitrability and no inconsistency with the United States Supreme Court decisions were final, the law of the case, res judicata and entitled to full faith and credit by all other courts and forums. In *Ealy* v. *McGahen*, 37 N.M. 246, 21 P2d 84 (1933) the New Mexico Supreme Court in discussing res judicata stated the following:

> "Final judgments are conclusive as to the claim or demand in controversy as to the parties in the suit and those in privity with them, not only as to every matter which was offered to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Public policy requires that there be an end to litigation and that rights once

established by a final judgment shall not again be litigated in any subsequent proceeding."

The very essence of GAC's motion to stay proceedings in this court was its claim that there was an agreement between the parties to arbitrate the dispute. The Court declared GAC had waived any right to arbitration. The legal effect of that declaration was that any agreement to arbitrate no longer existed; it vanished, disappeared.

On April 4, 1978, this Court entered a judgment declaring the contract between UNC and GAC to be void and unenforceable. That judgment was affirmed by the New Mexico Supreme Court on August 29, 1980. *United Nuclear Corp.* v. *General Atomic Co.*, _____ N.M. _____. That judgment is final, res judicata, and entitled to full faith and credit until and unless reversed by the United States Supreme Court. At least from April 4, 1978, there was no contract. There was no agreement to arbitrate.

Following this Court's denial of GAC's motion to stay proceedings, GAC initiated arbitration proceedings. GAC did not petition a court to compel arbitration, since there was no doubt UNC had refused to arbitrate, but requested the American Arbitration Association for arbitration. Other than by implication in its motion to stay proceedings in this court, GAC has never petitioned a court to compel arbitration. At GAC's request the American Arbitration Association started arbitration proceedings. UNC under protest appointed an arbitrator and participated in the preliminary proceedings until it became apparent that a majority of the arbitrators would not be bound by the New Mexico judgments and decisions. UNC withdrew from any further participation. The arbitrator appointed by UNC later filed a dissent to the action by the other arbitrators and resigned. The two remaining arbitrators then proceeded to do what the United States Supreme Court had refused to do — review and reverse the New Mexico Supreme Court decision of May 7, 1979. Congress has the power to constitute tribunals inferior to the United States Supreme Court. However, Congress by enacting the Federal

Arbitration Act did not intend nor would it have the power to create a tribunal superior to or even co-equal with the United States Supreme Court. By some unfathomable sophistry the two arbitrators concluded that all proceedings in the New Mexico District Court and the New Mexico Supreme Court after April 2, 1976, were void or to use their words, "corom non judice." They reached that conclusion even though there is not the slightest hint that the United States Supreme Court intended such a result in the prior opinions. *General Atomic Co.* v. *Felter*, 434 U.S. 12 (Felter I) and 436 U.S. 493 (Felter II).

The United States Supreme Court decisions were quite straightforward: a state court cannot deny a party access to federal forums. At the time of Felter II, the United States Supreme Court had before it the judgment of this Court declaring that GAC had waived its right to arbitration and that the issues were not arbitrable. The only fault the Supreme Court found with the judgment was the one part which interfered with GAC's right of access to a federal forum. At the time GAC petitioned the United States Supreme Court for a Writ of Certiorari, *General Atomic Co.* v. *United Nuclear Corp.*, 444 U.S. 911, that Court had before it the decision of the New Mexico Supreme Court affirming the judgment declaring waiver and nonarbitrability and the holding there was no inconsistency with the prior decisions of the United States Supreme Court in this case. Certiorari was denied. Common sense and respect for the United States Supreme Court dictates that had the Court believed all action in the New Mexico courts was void after April 2, 1976, they would have said so. To make the interpretation the arbitrators did would place the United States Supreme Court in a position of playing capricious games with the lower courts and litigants. This Court absolutely refuses to believe the United States Supreme Court would indulge in such conduct.

There is a vast difference between a right of access to a forum and a right to the relief sought in that forum. Neither of the parties could be denied access to the Federal District

Court for Southern California or New Mexico or the state court in California. However, having access did not carry with it the right to the relief sought as evidenced by the rather hasty empty handed exit. GAC's right of access to the arbitration forum did not, under the facts of this case, carry any rights to the relief sought.

On April 4, 1978, this Court entered a judgment declaring the contract between UNC and GAC to be void and unenforceable. From April 4, 1978, there was nothing to arbitrate. The arbitrators were aware of that judgment. On August 29, 1980, the New Mexico Supreme Court affirmed the judgment. The arbitrators were aware of that decision. Undaunted the arbitrators made a purported award on September 10, 1980, in favor of GAC. If not before, at least after April 4, 1978, all action taken by the two arbitrators was corom non judice.

Considering the totality of the action of the arbitrators, the judgments and decisions of the New Mexico Courts and the opinions of the United States Supreme Court an inescapable conclusion appears. The two arbitrators simply did not agree with the results reached by the New Mexico courts. They chose to ignore the courts and reach their own results. Such action at best was a heedless disregard for the fundamental principles of American jurisprudence.

By failing to give full faith and credit to the valid final judgments and decisions of the New Mexico courts which were res judicata as to these parties the arbitrators exceeded their powers. At least after the judgment of this Court, which was affirmed by the New Mexico Supreme Court, declaring there was no contract between the parties to arbitrate, the only powers in the arbitrators was to dismiss the proceedings. The arbitrators so imperfectly executed their powers that a mutual, final and definite award upon the subject matter was not made.

Plaintiff UNC is entitled to the relief requested in its petitions.

Some courts involved in this case have commented on the enormous costs for discovery and attorneys' services. There also have been enormous costs to the taxpayers in furnishing facilities, personnel from bailiffs to judges and mountains of paper logistics in the many courts this case has visited. Therefore this fervent prayer: Appellate Court, affirm, reverse or modify, but please do not remand.

/s/ JAMES W. MUSGROVE
James W. Musgrove
District Judge

Filed in Open Court
January 9, 1981

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
STATE OF NEW MEXICO, COUNTY OF SANTA FE

No. 50827

UNITED NUCLEAR CORPORATION, *Plaintiff,*

v.

GENERAL ATOMIC COMPANY, et al, *Defendants,*
INDIANA & MICHIGAN ELECTRIC COMPANY,
Third-party Defendants.

Decision

(Filed January 9, 1981)

This matter came before the Court on plaintiff's petitions for supplemental relief pursuant to the New Mexico Declaratory Act and the mandate of the New Mexico Supreme Court and to vacate the arbitration award pursuant to the Federal Arbitration Act.

The Court for its decision makes the following findings of fact and conclusions of law.

Findings Of Fact

1. On December 31, 1975, plaintiff, United Nuclear Corp. (UNC) filed an action for a declaratory judgment involving a contract between UNC and defendant, General Atomic Co. (GAC).

2. On April 2, 1976, this Court entered a judgment denying GAC's motion to dismiss for lack of personal jurisdiction.

3. On October 15, 1976, the New Mexico Supreme Court affirmed the judgment entered April 2, 1976, as to personal jurisdiction. *United Nuclear Corp.* v. *General Atomic Co.*, 90 N.M. 97. No further appeal was taken.

4. On November 29, 1977, GAC filed with the American Arbitration Association a demand for arbitration of the same dispute with UNC.

5. On November 30, 1977, GAC filed a motion to stay proceedings in this Court pending arbitration of the dispute.

6. On December 27, 1977, this Court entered a decision and judgment denying the motion to stay proceedings and declared that GAC had waived any right to arbitration, that the issues of violations of New Mexico antitrust laws were not arbitrable and that all other issues were so entertwined with the antitrust issues, none were arbitrable.

7. On May 7, 1979, the New Mexico Supreme Court affirmed this Court's decision and judgment of December 27, 1977, *United Nuclear Corp.* v. *General Atomic Co.*, 93 N.M. 105 and also held there was no inconsistency between the United States Supreme Court decisions, *General Atomic Co.* v. *Felter*, 434 U.S. 12 and 436 U.S. 493.

8. On October 9, 1979, the United States Supreme Court denied certiorari to review the New Mexico Supreme Court opinion referred to in Finding No. 7, *General Atomic Co.* v. *United Nuclear Corp.*, 444 U.S. 911.

9. On April 4, 1978, this Court entered a judgment declaring the contracts between UNC and GAC were null, void, unenforceable and of no effect whatever.

10. On August 29, 1980, the New Mexico Supreme Court affirmed this Court's judgment of April 4, 1978. *United Nuclear Corp.* v. *General Atomic Co.*, _____ N.M. _____.

11. Under protest UNC named an arbitrator and participated in the preliminary proceedings of arbitration until March 29, 1979.

12. On March 29, 1979, the arbitration panel announced it would not give full faith and credit to the New Mexico judgments and decisions. UNC withdrew from further participation. Thereafter the arbitrator appointed by UNC resigned.

13. Shortly after the entry of same this Court's decisions and judgments of December 27, 1977 and April 4, 1978 and the New Mexico Supreme Court opinions of May 7, 1979 and August 29, 1980 were furnished the arbitrators.

14. On September 10, 1980, the two remaining arbitrators issued an arbitration award in favor of GAC. *In The Matter of An Arbitration Between General Atomic Company and United Nuclear Corporation,* No. 73-10-0078-77.

15. The United States District Court for the Southern District of California has dismissed GAC's application and motion to confirm the arbitration award for lack of jurisdiction. *General Atomic Co.* v. *United Nuclear Corp.* Case No. 80-1585E.

16. The United States District Court for the District of New Mexico has declined to assist in the confirmation of the arbitration award or to interfere with this Court's proceedings on the petitions filed herein. *United Nuclear* v. *General Atomic Co.,* Case No. Civ. 80-845-HB.

17. GAC's application to confirm the arbitration award filed in the State Court of California has been dismissed by the California Court of Appeals.

18. GAC has never petitioned any court to compel arbitration.

19. No court has ever ordered arbitration of the dispute between UNC and GAC.

20. The United States Supreme Court opinions in *General Atomic Co.* v. *Felter,* 434 U.S. 12, and 436 U.S. 493 held only that this court could not deny nor interfere with GAC's right of access to the federal forum.

Conclusions Of Law

1. This Court has personal and subject matter jurisdiction in this cause for the purpose of granting supplemental relief under the New Mexico Declaratory Judgment Act and the Federal Arbitration Act.

2. The venue in this Court is proper for granting supplemental relief under the New Mexico Declaratory Judgment Act.

3. The venue in this Court is proper for vacating the arbitration award pursuant to the Federal Arbitration Act.

4. This Court's decision and judgment of December 27, 1977, declaring that GAC had waived its right to arbitration and that the issues were not arbitrable is a valid final judgment. The judgment is res judicata as to these parties and has been since December 27, 1977. The judgment is entitled to full faith and credit by all courts and forums.

5. The opinion of the New Mexico Supreme Court holding that there was no inconsistency between the United States Supreme Court decisions and the judgment of this Court is the law of this case. It is res judicata as to these parties and is entitled to full faith and credit.

6. The judgments of this Court of April 4, 1978, and May 17, 1978, are valid final judgments, declaring the contracts between the parties to be null, void and unenforceable.

7. At least as of April 4, 1978, there was no agreement between the parties to arbitrate their dispute.

8. The arbitrators had no jurisdiction to issue an award in the purported arbitration.

9. In failing to give full faith and credit to the judgments and decisions of this Court and the New Mexico Supreme Court the arbitrators acted in manifest disregard of the law.

10. The arbitrators exceeded their powers.

11. The arbitrators so imperfectly executed their powers that a mutual, final and definite award was not made.

12. Plaintiff is entitled to a supplemental judgment of this Court declaring that the judgment of December 27, 1977 is not affected by the purported award of the arbitrators because the action of the arbitrators was illegal, void and of no effect.

13. Plaintiff is entitled to a judgment of this Court vacating the purported award of the arbitrators as provided by Section 10 of the Federal Arbitration Act.

All requested findings of fact and conclusions of law not adopted herein are hereby refused.

/s/ JAMES W. MUSGROVE
James W. Musgrove
District Judge

Filed in Open Court
January 9, 1981

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
STATE OF NEW MEXICO, COUNTY OF SANTA FE

No. 50827

UNITED NUCLEAR CORPORATION, *Plaintiff,*

v.

GENERAL ATOMIC COMPANY, et al, *Defendants,*

INDIANA & MICHIGAN ELECTRIC COMPANY, *Third-party Defendants.*

Judgment

(Filed January 9, 1981)

This matter came before the Court on plaintiff's petitions for supplemental relief pursuant to Section 9 of the New Mexico Declaratory Act and to vacate the arbitration award pursuant to Section 10 of the Federal Arbitration Act. The Court having considered the matters presented, having heard argument of counsel and having entered its decision, which by reference is made a part of this judgment, finds the plaintiff is entitled to the relief requested.

IT IS THEREFORE ORDERED AND DECLARED that the action of the arbitration panel and the purported award issued by the arbitration panel in *In The Matter of An Arbitration Between General Atomic Company and United Nuclear Corporation,* No. 73-10-0078-77, American Arbitration Association is illegal, void and of no effect on the judgment entered by this Court on December 27, 1977, and plaintiff is still entitled to all the rights, benefits and relief granted by that judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the arbitrators in *In The Matter of An Arbitration Between General Atomic Company and United Nuclear Corporation,* No. 73-10-0078-77 having exceeded their powers and having

so imperfectly executed their powers that a mutual, final and definite award upon the subject matter was not made, the award is hereby vacated and held for naught.

/s/ JAMES W. MUSGROVE
James W. Musgrove
District Judge

Filed in Open Court
January 9, 1981

APPENDIX C

IN THE SUPREME COURT OF
THE STATE OF NEW MEXICO

Monday, October 4, 1982

NO. 13,536

UNITED NUCLEAR CORPORATION,
Plaintiff-Appellee,

v.

GENERAL ATOMIC COMPANY,
Defendant-Apppellant.

This matter coming on for consideration by the Court upon Motion of Appellant for Rehearing, and the Court having considered said motion and brief of counsel and now being sufficiently advised

NOW, THEREFORE, IT IS ORDERED that Motion of Appellant for rehearing is hereby denied.

ATTEST: A TRUE COPY

/s/ ROSE MARIE ALDERETE

Clerk of the Supreme Court
of the State of New Mexico

APPENDIX D

AMERICAN ARBITRATION ASSOCIATION

No. 73-10-0078-77

IN THE MATTER OF AN ARBITRATION BETWEEN GENERAL ATOMIC COMPANY (GAC)

AND

UNITED NUCLEAR CORPORATION (UNC)

PARTIAL AWARD

(Received November 14, 1979)

AMERICAN ARBITRATION SAN DIEGO

RES JUDICATA, FULL FAITH AND CREDIT

WAIVER OF ARBITRATION

This arbitration is conducted under the auspices of the American Arbitration Association pursuant to a demand for arbitration filed by General Atomic Company (GAC) upon United Nuclear Corporation (UNC) on November 29, 1977.

The arbitration clause is as follows:

> In the event that any disputes, which may arise between the parties during the course of this Agreement, cannot be mutually resolved, either party may elect to submit such disputes to arbitration in accordance with the Rules of the American Arbitration Association. Upon notice of such election, each party shall designate one member of the arbitration panel and the designees shall choose an impartial third member who shall chair the panel.
>
> The panel shall hear and consider the position of each party and shall equitably resolve the dispute by a determination based on the terms and conditions of this

Agreement. Such determination shall be final and binding on both parties and judgment upon the award rendered by the Arbitrators may be entered in any Court having jurisdiction thereof.

Under that clause GAC has designated Willard Wirtz as its arbitrator and UNC has designated Julian Levi as its arbitrator. Those designees chose Walter V. Schaefer as the impartial third member and chairman of the panel. It should be noted at the outset that at the first arbitration hearing each of the party designated arbitrators stated his intention to be completely impartial with respect to any determinations made by the panel. It should also be noted that UNC is participating in this arbitration under protest.

To an unusual degree, the outcome of this arbitration depends not only upon the terms of the contract and the conduct of the parties thereunder but also upon the significance of several judgments of the Supreme Court of the United States, the Supreme Court of New Mexico and the United States District Court for New Mexico, as well as other judicial decisions. A summary of prior events and proceedings is essential to an understanding of the issues that now confront the arbitration panel.

GAC is a partnership composed of Gulf Oil Corporation (Gulf) and Scallop Nuclear, Inc. (Scallop). (There were references at a hearing before the Panel on March 26, 1979, to a change in the relationship of the partners. Whatever may be the internal effect of that change, it can not alter the rights and liabilities of the partnership with respect to third persons.) UNC owns uranium deposits in New Mexico and is engaged in mining and milling uranium and the fabrication of uranium into fuel.

Between 1966 and May of 1971 UNC entered into long term agreements with four utilities to supply them with large quantities of uranium concentrates and with finished nuclear-reactor fuel. In the summer of 1971 UNC and Gulf formed a jointly owned corporation known as Gulf United Nuclear Fuels Corporation (GUNF). UNC owned 43% of the stock of

GUNF, and Gulf owned 57%. By what is known as the 1971 Supply Agreement, UNC then assigned its agreements with the utilities to GUNF, and agreed to supply GUNF with the uranium necessary to perform those contracts. UNC retained its mining and milling properties and facilities, but transferred its fabrication facilities to GUNF. Thereafter, in 1973 Gulf purchased UNC's interest in GUNF which became a wholly owned subsidiary of Gulf. UNC and GUNF then entered into the agreement which is the subject of this arbitration, which is referred to as the 1973 Supply Agreement. That agreement replaced the 1971 Supply Agreement.

GUNF was then merged into Gulf and in 1974 Gulf transferred to GAC the agreements with the utilities and the rights and obligations under the 1973 Supply Agreement, as well as the physical facilities of GUNF.

The price of uranium began to increase sharply during and after 1973 and it has continued to rise at least until the commencement of the hearings in this arbitration. Until the summer of 1975 UNC continued to deliver uranium pursuant to the 1973 supply agreement.

In 1975 UNC ceased to make deliveries, and on August 8, 1975, UNC brought an action in Santa Fe District Court against GAC, Gulf and Scallop. The complaint alleged that the 1973 supply agreement was void as a result of Gulf and GAC's fraud, economic coercion, breach of fiduciary duties and violations of the New Mexico antitrust act. The complaint also sought relief on the ground that performance of its long term agreements had become commercially impractical. The defendants removed the action to the United States District Court on diversity grounds. UNC then voluntarily dismissed its action on December 31, 1975.

On the same day UNC instituted another action in the Santa Fe County District Court. The complaint was identical with that filed in the earlier action, except that diversity of citizenship was eliminated because Gulf and Scallop were not named as defendants in the second action.

GAC filed motions to dismiss. On March 15, 1976, at the request of UNC, the trial judge entered a temporary restraining order, and on April 2, 1976 a temporary injunction, directed to GAC and its partners. The injunction stated: "This injunction prohibits the institution or prosecution of ordinary litigation, third party proceedings, cross-claims, arbitration proceedings or any other method or manner of instituting actions, claims or demands relating to the subject matter of this lawsuit, or including United Nuclear Corporation as a party thereto." On April 14, 1976 the New Mexico Supreme Court granted an alternative writ of prohibition staying "the enforcement of the injunction". On June 15, 1976, however, that court, without opinion, quashed the alternative writ as improvidently granted. GAC sought a writ of certiorari to review that judgment of the Supreme Court of New Mexico. UNC opposed the allowance of certiorari on the theory that the judgment was based upon adequate state grounds.

The Supreme Court of the United States issued a memorandum order on November 29, 1976 (429 U.S. 973, 50 L.Ed. 2d, 581, 97 S.Ct. 479), which stated that the petition for writ of certiorari to the Supreme Court of New Mexico was granted and the judgment of that Court was vacated and the cause remanded to the Supreme Court of New Mexico to consider whether the judgment was "based upon Federal or State grounds or both." Pursuant to that mandate the Supreme Court of New Mexico rendered its further opinion on February 21, 1977. (560 Pac.2d. 541.) The Court there held that the New Mexico trial court had inherent equity power to issue an injunction restraining the parties to a suit before it from instituting further proceedings concerning the same subject matter.

The case was brought again to the Supreme Court of the United States, which granted certiorari and on October 31, 1977 reversed the judgment of the Supreme Court of New Mexico and remanded the case to that Court for "further proceedings not inconsistent with this opinion." The Chief

Justice and six Associate Justices concurred in the per curiam opinion. Mr. Justice Blackmun would not have disposed of the case summarily but would have granted certiorari and heard argument. Mr. Justice Rhenquist dissented. *General Atomic Co.* v. *Felter,* 434 U.S. 12, 54 L.ed. 2d 199.

While the authority of the Santa Fe trial court to enjoin federal arbitration and judicial proceedings was being determined in the United States Supreme Court, activity had continued in the trial court. On April 5, 1976, UNC had filed an amended complaint which added a count alleging that a 1974 supply agreement between GAC and UNC was also invalid because of economic coercion; on May 5, 1976, GAC had answered the amended complaint and filed a counterclaim, and there had been extensive discovery. (Whether GAC had waived its right to arbitrate by any action it took in this case or in other proceedings will be subsequently discussed.)

The case had been set for trial in the Santa Fe court on October 31, 1977. That was the day on which the Supreme Court of the United States entered its judgment reversing the Santa Fe court's injunction and holding:

> "We conclude that the New Mexico Supreme Court's distinction is un-tenable and that *the injunction is in direct conflict with* that decision and *the Supremacy Clause of the Constitution.*" (Emphasis supplied. The decision referred to is *Donovan* v. *Dallas,* 337 U.S. 408 (1964).)

On November 3, 1977 GAC made an oral motion to vacate the injunction. UNC opposed the motion. Its attorney suggested that UNC might file a petition for rehearing, and urged the court to wait for the mandate of the Supreme Court of New Mexico. He stated: "We need the injunction more than ever." By agreement the motion to vacate was continued until November 6, 1977, and on that date it was denied. The injunction remained in effect and the trial proceeded while the formal mandates were making their way back from the Supreme Court of the United States to the Supreme Court of New Mexico, and from that court to the Santa Fe court.

When the mandate got back to Santa Fe, the court modified its injunction on November 28, 1977. On November 29, 1977, GAC filed its demand for arbitration, and on the following day moved to stay proceedings in the Santa Fe court. On December 6, 1977, UNC moved for an order staying the arbitration and submitted proposed findings and conclusions and a proposed partial final judgment.

On December 16, 1977, the Santa Fe court adopted the proposed findings of fact and conclusions of law concerning the "issue of arbitration" which had "been submitted for summary determination on December 6, 1977." On the basis of those findings and conclusions the court entered its "partial final judgment" which stayed "until the further order of the court," the present arbitration proceeding, as well as other arbitration proceedings in North Carolina and Illinois. The order also contained the following provisions:

> "Provided, however that this Partial Final Judgment shall not, in and of itself, operate to preclude Defendant General Atomic Company from asserting claimed federal rights in appropriate judicial proceedings.
>
> IT IS FURTHER ORDERED, DECLARED, DETERMINED AND ADJUDICATED that Defendant General Atomic Company has no right to arbitrate any issue in the aforesaid arbitration proceedings or pending herein against Plaintiff, United Nuclear Corporation."

By a separate order of December 16, 1977, entered in accordance with the following finding,

> "22. On November 28, 1977, GAC declared in open court that it intended to pursue relief under the Federal Arbitration Act and requested the court to stay the trial of this case pending resolution of those matters. The court declined to stay proceedings."

the court denied GAC's motion to stay the trial.

Subsequently, on December 27, 1977, the court entered another "partial final judgment," which again denied GAC's motion to stay proceedings. This latter order was apparently a

formal step regarded as necessary or desirable to put the previous order refusing to stay the trial into appropriate form for an interlocutory appeal. It was accompanied by findings and conclusions which were identical with those that accompanied the December 16, 1977 order. Neither set of findings and conclusions, and neither "partial final judgment" mentioned the judgment of the Supreme Court of the United States, which had determined that the injunction that restrained GAC from seeking federal arbitration was in violation of the Supremacy Clause of the Constitution.

On March 3, 1978, GAC filed a motion in the Supreme Court of the United States for leave to file a petition for an original writ of mandamus directing the Santa Fe court to vacate its orders of December 16, 1977, and December 27, 1977, on the ground that they violated the mandate of the Supreme Court of the United States in *General Atomic* v. *Felter,* 54 L.Ed. 2d 199.

While the case was again making its way to the Supreme Court of the United States, the proceeding before the Santa Fe court was continuing, and on March 2, 1978, the Santa Fe court entered a "Sanctions Order and Default Judgment" which ordered the striking of GAC's answer and counterclaim. That order was entered pursuant to Rule 37 of the New Mexico Rules of Civil Procedure for failure to comply with discovery orders. On April 4, 1978 the Santa Fe Court entered its Declaratory Judgment as to the issues between UNC and GAC. That order stated:

> "A. The 1973 Uranium Supply Agreement executed on September 12, 1973, as of June 30, 1973 between United Nuclear Corporation, Gulf Oil Corporation and Gulf United Nuclear Fuels Corporation is null, void, unenforceable and of no effect whatever and performance thereunder is excused.
>
> B. The Uranium Concentrates Agreement between United Nuclear Corporation and General Atomic Company dated June 28, 1974 is null, void, unenforceable and of no effect whatever and performance thereunder is excused.

C. General Atomic Company is obligated to indemnify and save United Nuclear Corporation harmless from any and all claims, causes of action, liabilities, obligations, damages, costs and expenses arising out of, or in any way connected with or relating to the latter's failure to deliver or perform under the aforesaid 1973 Uranium Supply Agreement or any other contract with an electric utility company covered by or related to said agreement.

D. General Atomic Company's defenses to United Nuclear Corporation's First Amended Complaint, as set forth in its Answer and in the Pre-trial Order, should be, and is hereby, stricken and held for naught.

E. General Atomic Company's Counterclaim against United Nuclear Corporation and each and every count thereof, as stated in said Counterclaim and in the Pre-trial Order should be, and is hereby, stricken and held for naught."

On May 17, 1978, the Santa Fe court entered its final judgment on damage issues in favor of UNC and against GAC.

On May 30, 1978, the Supreme Court of the United States issued its opinion and judgment in the original mandamus action. (436 U.S. 493, 56 L.ed.2d 480). The per curiam opinion stated:

"Petitioner has filed a motion for leave to file a petition for a writ of mandamus and requests that a writ of mandamus issue to the District Court for the First Judicial District, Santa Fe County, N.M., directing the court to vacate two orders on the ground that they violated this Court's mandate in *General Atomic Co.* v. *Felter,* 434 US 12, 54 L Ed 2d 199, 98 S Ct 76 (1977)"

"In that opinion we held that under the Supremacy Clause of the United States Constitution the Santa Fe court lacked power to enjoin General Atomic Company (GAC) from filing and prosecuting in personam actions against United Nuclear Corporation (UNC) in federal

court. Upon remand, the Santa Fe court modified its injunction 'to exclude from its terms and conditions all in personam actions in Federal Courts and all other matters mandated to be excluded from the operation of said preliminary injunction by the opinion of the Supreme Court, dated October 31, 1977,' Shortly thereafter, GAC filed a demand for arbitration with UNC of issues growing out of the 1973 uranium supply agreement around which the litigation between the parties revolves. This demand, filed with the American Arbitration Association, relied upon the Federal Arbitration Act, . . . and the arbitration clause of the 1973 agreement."

* * *

"Finally, GAC requested the Santa Fe court to stay its own trial proceedings with respect to issues subject to these arbitration demands. UNC, in addition to opposing this motion, also asked the court to stay the arbitration proceedings.

On December 16, 1977, the Santa Fe court issued a decision in which it concluded that GAC had waived any right to arbitration with UNC which it might have had because it failed to demand arbitration in a timely manner and that neither the Duke nor Commonwealth Agreements gave GAC any right to demand arbitration with UNC. On the basis of these conclusions, Judge Felter filed the following order staying the arbitration proceedings:

* * *

"In its order of December 16, 1977, the Santa Fe court has again done precisely what we held that it lacked the power to do: interfere with attempts by GAC to assert in federal forums what it views as its entitlement to arbitration. Clearly, our prior opinion did not preclude the court from making findings concerning whether GAC had waived any right to arbitrate or whether such a right was contained in the relevant agreements. Nor did our

prior decision prevent the Santa Fe court, on the basis of such findings, from declining to stay its own trial proceedings as requested by GAC pending arbitration in other forums. But, as demonstrated supra, we have held that the Santa Fe court is without power under the United States Constitution to interfere with efforts by GAC to obtain arbitration in federal forums on the ground that GAC is not entitled to arbitration or for any other reason whatsoever. GAC, as we previously held, has an absolute right to present its claims to federal forums."

* * *

"A litigant, who, like GAC, has obtained judgment in this Court after a lengthy process of litigation, involving several layers of courts, should not be required to go through that entire process again to obtain execution of the judgment of this Court. In light of the prior proceedings in this matter, it is inconceivable that upon remand from this Court the Santa Fe court was free to again impede GAC's attempt to assert its arbitration claims in federal forums. Because the Santa Fe court has refused or failed to comply with the judgment of this Court, petitioner's motion for leave to file a petition for a writ of mandamus is granted. Assuming as we do that the Santa Fe court will now conform to our previous judgment by promptly vacating or modifying its order of December 16, 1977 to the extent that it places any restriction whatsoever upon GAC's exercise of its right to litigate arbitration claims in federal forums, we do not at present issue a formal writ of mandamus."

In the following footnote the Supreme Court explained why it did not order the Santa Fe court to vacate or modify its order of December 27, 1977:

"We do not read the December 27, 1977, order as restricting GAC from pursuing its arbitration claims in other forums. Consequently there is no occasion to disturb it."

The main thrust of the opinion of the Supreme Court of the United States is that under the Supremacy Clause of the federal Constitution the New Mexico trial court lacked power — and therefore was without jurisdiction — to enjoin GAC from presenting its claim to arbitration to a federal arbitration panel. The Court squarely held that by its December 16, 1977 order "the Santa Fe Court has again done precisely what we held that it lacked power to do: interfere with attempts by GAC to assert in federal forums what it views as its entitlement to arbitration." And the Court further pointed out "that the Santa Fe Court is without power under the United States Constitution to interfere with efforts by GAC to obtain arbitration in federal forums on the ground that GAC is not entitled to arbitration or for any other reason whatsoever. GAC, as we previously held, has an absolute right to present its claims to federal forums."

Problems of interpretation of the opinion, however, have resulted from the following two sentences:

> "Clearly, our prior opinion did not preclude the court from making findings concerning whether GAC has waived any right to arbitrate or whether such a right was contained in the relevant agreements. Nor did our prior decision prevent the Santa Fe Court, on the basis of such findings, from declining to stay its own trial proceedings as requested by GAC pending arbitration in other forums."

On the basis of these two sentences UNC argues that the Supreme Court has decided that the Santa Fe court had jurisdiction to determine whether GAC had any right to arbitrate and if it did, whether that right had been waived. UNC also argues that the Supreme Court has determined that the Santa Fe court proprerly refused to stay its own trial proceedings pending arbitration.

There is a surface plausibility to these contentions, but they will not withstand analysis in the light of the procedural posture of the case before the Supreme Court of the United

States and the limitations upon that Court's jurisdiction in an original action of mandamus.

The issuance of such a writ to compel obedience is a prior mandate of the Supreme Court of the United States is an extraordinary remedy, and under the Supreme Court's procedural and jurisdictional rules, the mandamus petition filed by GAC could present to the Court only the question of compliance with the Supreme Court's prior mandate. (See Supreme Court Rule 31(3).) It could not properly bring before that Court any matters that were not embraced within that prior determination.

In applying those rules the Supreme Court recently stated in *Helstoski* v. *Meanor,* 61 L.ed 2d 30, 33 (June, 1979.):

> "Almost a hundred years ago this Court explained, 'The general principle which governs proceedings by mandamus is that whatever can be done without the employment of that extraordinary writ, *may not be done with it.* It lies only when there is practically *no other remedy.*' *Ex parte Rowland,* 104 U.S. 604, 617 (1882) (Emphasis added). More recently we summarized certain considerations for determining whether the writ should issue;
>
> > 'Among these are that the party seeking issuance of the writ have no other adequate means to attain the relief he desires, and that he satisfy "the burden of showing that [his] right to issuance of the writ is 'clear and indisputable'." Moreover, it is important to remember that issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed.' *Kerr* v. *United States District Court,* 426 U.S. 394, 403 (1976) (citations omitted.)"

This is what the Supreme Court had in mind when it pointed out that "clearly" its prior determination had not expressed any judgment whatsoever with respect to the questions of GAC's right to arbitrate, its waiver of that right, or the authority of the Santa Fe court to stay its own trial proceedings. Since those questions had not even been determined

by the Santa Fe court when the Supreme Court's prior opinion was announced, it is obvious that they were not embraced within the prior judgment of the Supreme Court. Consequently, they could not be determined by that Court in the original action for mandamus which was pending before it. And as the Supreme Court of the United States pointed out in its footnote 2 (56 L.Ed. 485) the Supreme Court did not disturb the Santa Fe Court's order of December 27, 1977 because it did not regard that order as restricting GAC from pursuing its arbitration claims in other forums.

On July 31, 1978 UNC instituted an action in the United States District Court for the District of New Mexico seeking to enjoin the American Arbitration Association from proceeding with the present arbitration. In addition to injunctive relief the Complaint sought a declaratory judgment that the AAA had no right to proceed with the pending arbitration or to force UNC to participate in it. The Complaint recited the institution of UNC's action against GAC in the Santa Fe court, the removal of that case and its subsequent dismissal by UNC. It alleged the institution of the second action in the Santa Fe court, the filing of arbitration demands by GAC on November 30, 1977, and the December 16, and December 27, 1977 orders of the Santa Fe Court. Concerning the judgment of the Supreme Court of the United States which was handed down on May 30, 1978, the Complaint stated:

> "On May 30, 1978 the U.S. Supreme Court issued its opinion holding that the December 16, 1977 Judgment was in error, and also holding that the Santa Fe County District Court had the power to make the findings of fact, conclusions of law and enter the Partial Final Judgment of December 27, 1977.

The Complaint further alleged that on January 12, 1978 the AAA had suspended the present arbitration and on July 26, 1978 had notified UNC that it was lifting the suspension and at the same time directed UNC to appoint an arbitrator. The Complaint further alleged the entry of the April 4, 1978

Final Judgment of the Santa Fe Court and stated that it was pending on appeal in the Supreme Court of New Mexico.

Count I of the Complaint alleged that the judgments of the Santa Fe Court were *res judicata* and that they barred and collaterally estopped any attempts by the AAA to proceed with arbitration. Count I also asserted that any "arbitration proceeding instituted by the AAA would deprive UNC of the right to receive full faith and credit for the December 27, 1977 and April 4, 1978 judgments of the Santa Fe County District Court guaranteed to it by Article IV Section One of the Constitution of the United States. Moreover, any attempt by the AAA to proceed with arbitration would violate the Federal Arbitration Act, 9 USC §1 *et seq.*"

Count II of the complaint sought a temporary restraining order as well as a preliminary injunction and tendered a bond to secure the payment of any damages suffered by AAA if the temporary restraining order should subsequently be found to be wrongfully entered.

Count III sought damages in a large amount "which may exceed $1,000,000" as a result of AAA proceeding with the arbitration. That Count also sought expenses which "may exceed the sum of $50,000."

Count IV consisted of a detailed description of events which took place with respect to the actions instituted by UNC in the Santa Fe court and the orders and pleadings in those cases. It alleged that as a result of the discovery orders entered by that Court UNC has incurred tremendous expenditures of time, effort and money in the preparation of the case for trial on the merits and has been prejudiced by GAC's failure "to timely demand arbitration" and that UNC would be irreparably injured if arbitration were ordered." It also alleged that GAC was in default and had voluntarily and intentionally relinquished any rights it may have had to arbitrate. Court IV further alleged:

> "The arbitration clause contained in Article XVII of the 1973 Supply Agreement is limited in scope to those issues

which may be resolved by an application of the terms and conditions of the 1973 Supply Agreement. Claims of fraud, antitrust, commercial impracticability or other claims extrinsic to the contract may not be arbitrated.

Count IV further alleged that GAC had failed to elect to proceed with arbitration within a reasonable time and that any right it may have had to do so had lapsed. UNC prayed for a declaration that the AAA had no right to proceed with any arbitration.

Before the United States District Court UNC argued that its Complaint should not be dismissed for want of an indispensable party — GAC — and argued that UNC had no alternative forum. It stated:

"There is one factor mentioned in Rule 19(b) that UNC believes to be controlling. That is:

'whether the Plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.'

This portion of Rule 19(b) requires a court to consider whether the plaintiff can sue effectively in other forums where better joinder would be possible. *Provident Tradesmens Bank & Trust Co.* v. *Patterson,* 390 U.S. 102 (1968); *Pennwalt Corp. Inc.* v. *Train, supra.*

UNC has no other forum available to vindicate its rights. The May 30, 1978 opinion of the U.S. Supreme Court held that a state court may not enjoin arbitration which has been invoked under the Federal Arbitration Act. Only a federal court may do so. Thus UNC has no alternative remedies available to it.

To this argument the American Arbitration Association responded:

"The Third factor to consider is whether the Plaintiff will have an adequate remedy if the action is dismissed. The obvious answer is arbitration, which Plaintiff voluntarily agreed to utilize in the 1973 Agreement with GAC. All of the issues including those of waiver of the right to

arbitrate could be raised and adjudicated by the arbitrators. *Prima Paint Corp.* v. *Flood & Conklin,* 388 U.S. 395, 18 L.ed2d 1270 (1967) The alternative forum need not be judicial. See *Tewa Tesuque* v. *Morton,* 498 F.2d 240 (1974), *Cert. denied.* 420 U.S. 962, 43 L.ed.2d 440 (1975) where the court held that a New Mexico Pueblo tribal council afforded an adequate forum, thereby warranting dismissal of the Complaint."

In his Memorandum Opinion dismissing the case for want of jurisdiction, Judge Bratton stated:

"UNC has argued that there is no alternative forum, and that only a federal court can enjoin these arbitration proceedings. The AAA, on the other hand, argues that the arbitration panel itself can entertain the questions of *res judicata* and full faith and credit. This alternative appears to be an acceptable one. The language of the arbitration clause in the disputed contract appears broad enough to allow the arbitrators to hear this issue, and the AAA has itself acknowledged that it will consider the question. Though UNC would then have to go to arbitration to determine the initial propriety of the arbitration forum, their arguments would in fact be heard and considered. The inconvenience and cost to UNC of this route does not outweigh the prejudice to GAC if this action continues in its absence. The fact that the alternative forum is non-judicial does not seem relevant. The Tenth Circuit has previously approved consideration of a non-judicial forum, *Tewa Tesuque* v. *Morton,* 498 F.2d 240 (10th Cir. 1974), *cert. denied* 420 U.S. 962, and arbitration is a recognized arena for the settlement of disputes."

After its motion for reconsideration and for an injunction pending appeal had been denied by the Federal District Court, UNC appealed to the United States Court of Appeals for the 10th Circuit. Subsequently, it voluntarily dismissed that appeal.

After the termination of that litigation, the present arbitration panel was designated. UNC designated its arbitrator

under protest. Preliminary hearings were held on December 13, 1978, and January 25 and 26, 1979. Thereafter, in accordance with the instructions of the panel, each party filed an initial statement, followed by a reply statement.

GAC's initial statement of position before the arbitration panel described the 1973 Supply Contract, alleged breach of that contract by UNC, and the remedies for that breach. It also discussed the scope of discovery to be permitted in this arbitration, and the significance of the disqualification of UNC's counsel by the United States Court of Appeals for the Seventh Circuit. (*Westinghouse Electric Corp.* v. *Gulf Oil Corp.*, 588 F2d 221 (1978).

In its first statement of position UNC described certain issues relating to the basic arbitrability of the UNC-GAC dispute under the caption: "Preliminary Issues". It stated that these issues must be resolved before consideration can be given to further proceedings relating to the merits. The preliminary issues so specified by UNC are:

B. *The December 27, 1977 Partial Final Judgment is Entitled to "Full Faith and Credit" and Prohibits Arbitration in the UNC-GAC Disputes.*

C. *The Partial Final Judgment of December 27, 1977 is Res Judicata and Bars further Proceedings Herein.*

D. *The April 4, 1978 Final Declaratory Judgment is Entitled to Full Faith and Credit; is Res Judicata and Bars Arbitration.*

E. *There is no Agreement Extant by Which UNC and GAC Agreed to Arbitrate.*

F. *GAC Made no Timely Election to Arbitrate the Issues It Attempts to Raise Herein, and Arbitration is Accordingly Barred.*

G. *GAC Never Gave Timely Notice to UNC of any Purported Election to Arbitrate the Issues Hereof.*

H. *GAC Lost its Right to Elect to Arbitrate.*

I. *GAC Has Waived its Right to Arbitration.*

J. *Antitrust Issues Are Not Arbitrable.*

K. *Any Remaining Issues are So Intertwined with Antitrust Issues That None Can Be Arbitrable.*

L. *The Arbitration Clause of The 1973 Supply Agreement is Narrow and Allows Few Issues to be Arbitrated.*

M. *As A Matter of Comity The Arbitration Should Not Proceed Until GAC's Two Appeals Are Resolved.*

N. *UNC Is Not a Party To Any Contract With GAC Which Provides For Arbitration.*

O. *Alternatively, GAC is Not the Legal Representative and Successor of Any Party to the 1973 Uranium Supply Agreement.*

UNC's second statement of position reiterated its protest against the "very existence of this arbitration" and any of its proceedings. UNC therefore refused to file any further statement addressing its preliminary issues, its discovery demands or its defenses to GAC's claim, and stated:

> This Second UNC Statement of Position addresses the true "preliminary issues" i.e., whether judgments of the Santa Fe District Court in Case No. 50827 are *res judicata* as to all issues in this proceeding and whether the Panel must accord those judgments "full faith and credit" as required by the Constitution of the United States. The other issues identified as relating to arbitrability are subsumed and merged into the Santa Fe judgments and are also *res judicata* in this proceeding. Consequently, except as specifically noted herein, UNC respectfully declines to address the other matters raised in the Panel's February 5 memorandum to the parties. To do so would expose UNC to an unacceptable risk that it may waive a position otherwise available to it. Any consideration of arbitration other than to dismiss or indefinitely stay the arbitration pending final appellate

review of the Santa Fe judgments deprives UNC of constitutional rights it cannot relinquish.

UNC does address, in detail, the *res judicata* and "full faith and credit" issues below. Those issues are not intertwined with any other conceivable issue in this arbitration and must be determined independently of and before all other issues. To continue further with this arbitration without a determination of the very issues which would moot further proceedings prejudices UNC and denies it the protection of the Constitution. Therefore, UNC respectfully submits that the Panel must decide, as soon as possible, the issues of *res judicata* and "full faith and credit."

UNC's position concerning *res judicata,* collateral estoppel and full faith and credit focuses upon the December 27, 1977, March 27 and April 4, 1978 judgments of the Santa Fe court. The December 27, 1977 judgment which refused to stay the trial on the ground that GAC had waived its rights to arbitration was affirmed by the Supreme Court of New Mexico on May 7, 1979, and GAC's petition for certiorari to review that judgment has been denied by the Supreme Court of the United States. (48 U.S. Law Week 3236, October 7, 1979) The other judgments of the Santa Fe court are pending upon appeal in the Supreme Court of New Mexico. They do not directly bear upon GAC's right to Federal arbitration or the Santa Fe court's jurisdiction to prevent the exercise of that right. We agree with UNC's contention that the unreversed judgment of a New Mexico trial court has the same effect by way of *res judicata* and collateral estoppel, and is entitled to the same degree of full faith and credit, as is a judgment of the Supreme Court of New Mexico. The denial of a petition for certiorari by the Supreme Court of the United States carries no implication or inference concerning that Court's view of the merits of the case. *See, e.g. Hughes Tool Co.* v. *T.W.A.*, 409 U.S. 353, 34 L.ed 2d 577.

UNC's position rests upon the basic principle that the judgment of a court having jurisdiction of the parties and the

subject matter is *res judicata* and entitled to full faith and credit even though it is erroneous. For that principle it relies upon and cites many authorities. The basic principle is sound. It is not, and indeed could not, be disputed. Nor is it disputed that the Santa Fe court initially had jurisdiction of the parties and the subject matter. UNC therefore concludes: "The judgments in Case No. 50827 are entitled to 'full faith and credit' and therefore bar arbitral consideration of all GAC claims in this proceeding."

The difficulty with this conclusion is that it ignores the judgment of the Supreme Court of the United States which squarely held on October 31, 1977, that the Santa Fe court's injunction against arbitration was "in direct conflict with the Supremacy Clause of the Constitution." It also ignores the second judgment of the Supreme Court of the United States, entered on May 30, 1978, which reiterated the conclusion that the Santa Fe court was "without power under the United States Constitution to interfere with efforts by GAC to obtain arbitration in federal forums on the ground that GAC is not entitled to arbitration or for any other reason whatsoever." UNC contends that because the Supreme Court of the United States did not vacate the December 27, 1977 judgment of the Santa Fe court, it affirmed the jurisdiction of that court to proceed with the trial and to enter its subsequent judgments. For this position it relies upon the two sentences in the Supreme Courts May 30, 1978 opinion which have already been discussed. For the reasons we have stated, we are unable to concur in UNC's interpretation of those sentences.

The authorities cited by UNC and the arguments it advances simply do not address the unique full faith and credit question which this matter presents: What effect is to be given to a judgment entered by a state court after it has unlawfully barred a litigant from pursuing the federal remedy to which he is entitled?

In *Kalb* v. *Feuerstein,* 308 U.S. 433, 440 (N.2) 1940, the Supreme Court made this observation:

> "That a State court before which a proceeding is competently initiated may — by operation of supreme Federal law — lose jurisdiction to proceed to a judgment unassailable on collateral attack is not a concept unknown to our Federal system."

In the exercise of its power under the Commerce Clause of the Constitution of the United States, Congress enacted the Federal Arbitration Act, which gives parties the right to agree to submit to arbitration their disputes arising under contracts involving interstate commerce. The Supreme Court of the United States has twice held that the Santa Fe court exceeded its jurisdiction and violated the Supremacy Clause of the Constitution when it prevented GAC from exercising that right by its injunction.

In *Gordon* v. *Longest,,* 16 Peters 97, 10 L.ed. 900 (1842) a circuit court in Kentucky denied the defendant's motion to remove the action to the Federal court although the action was between citizens of different states and the declaration alleged that the requisite jurisdictional amount was involved. After the circuit court refused to allow removal, it proceeded with the trial before a jury. There was a verdict for the plaintiff, and judgment was entered on the verdict. The Court of Appeals of Kentucky affirmed. The Supreme Court of the United States reversed, holding:

> "The defendant was entitled to a right under the law of the United States; and, on the facts of the case, the judge had no discretion to withhold that right. No objection can be made to the form of the application, nor to the facts on which it was founded. This being clear, in the language of the above act, it was the duty of the State court to "to proceed no further in the cause." " And every step subsequently taken, in the exercise of a jurisdiction in the case, whether in the same court or in the Court of Appeals, was coram non judice.

* * *

> One great object in the establishment of the courts of the United States and regulating their jurisdiction was to have a tribunal in each State, presumed to be free from local influence, and to which all who were non-residents or aliens might resort for legal redress. But this object would be defeated if a State judge, in the exercise of his discretion, may deny to the party entitled to it a removal of his cause.
>
> A more summary remedy might have been pursued by the defendant than the one which this court can now give to him. But the cause being brought before us through the Supreme Court of the State, we reverse the judgment of affirmance by that court, and direct the cause to be remanded, with instructions that it shall be transmitted to the Circuit Court of the State, which shall be directed to enter an allowance of the petition of the defendant for the removal of the cause to the Circuit Court of the United States for the District of Kentucky, nunc pro tunc."

It is not only State courts that are required to honor the Congressional policy in favor of permitting parties to contracts involving interstate commerce to choose to submit their disputes to arbitration instead of litigation. In *Evans* v. *Hudson Coal Co.*, 165 Fed 970 (CA3, 1948), the court held that a motion for a stay pending arbitration asserted a defense of lack of jurisdiction of the subject matter authorized by FRCD Rule 12(b) (1). The court stated:

> "Rule 12(b) (1) will authorize the defendant to make an application for a stay pending arbitration if, as a matter of law, the issues presented by the instant suit are referable to arbitration. The pertinent language of Rule 12(b) (1) provides that a defense of "lack of jurisdiction over the subject matter", at the option of the pleader, may be asserted "by motion". If the issues presented by the instant suit are referable to arbitration, the court below, other conditions of the Arbitration Act being met, must grant the stay and hold its hand until arbitration be

completed. It is thus, pending arbitration, deprived of jurisdiction of the subject matter."

And in *Harper Sibley* v. *Tandy Corporation,* 543 F.2d 540, (CA5, 1976) the federal district court had entered a substantial judgment on a jury verdict in favor of the plaintiff after a trial that consumed 14 days and involved 22 witnesses and more than 100 documentary exhibits. The Court of Appeals reversed that judgment on the ground that the defendant's timely motion "to have the contract claims submitted to arbitration and to have the federal securities law claims stayed pending arbitration" should have been allowed. The court said:

> "The parties, by their agreement, committed the resolution of contractual disputes to arbitration. Both the policy behind the United States Arbitration Act and considerations of judicial economy required that Parker's contractual claims be submitted to arbitration and that the federal securities law claims be stayed pending the outcome of those proceedings."

When the foregoing authorities are applied to the present case, the conclusion is inescapable that the Santa Fe Court lacked jurisdiction to proceed after it had unlawfully issued its injunction which prohibited GAC from exercising its Federal remedy. The lack of jurisdiction to issue the injunction appears "on the face of the judgment roll." Unless judgments of the Supreme Court of the United States are to be treated as meaningless gestures, the subsequent proceedings of the Santa Fe court were, in the language of the Supreme Court, "coram non judice," and they are not entitled to full faith and credit.

It is the Panel's determination that all proceedings in the Santa Fe court following the entry of its illegal injunction restraining GAC from exercising its contractual right to arbitrate were coram non judice and that no subsequent proceedings in that court or elsewhere reinvested that court with jurisdiction over the controversy which is the subject of this arbitration. Those subsequent proceedings are therefore not res judicata and they are not entitled to full faith and credit.

* * *

WAIVER

In our consideration of UNC's contention that GAC has waived its right to arbitration, we focus upon the conduct of GAC prior to the invalid order of April 2, 1976. GAC at once attacked that order, and pursued the attack until the order was finally set aside. In the meantime, the Santa Fe court proceeded with the New Mexico litigation. GAC had no alternative. Its failure to defend in that proceeding would have risked default judgment, and any further move toward arbitration would have invited contempt proceedings. When the barrier of the April 2 order was ultimately removed by the Supreme Court of the United States, GAC moved immediately on November 30, 1977, to take this controversy to arbitration. So whatever occurred between April 2, 1976 and November 30, 1977, while GAC was vindicating its contractual right to arbitrate by "a lengthy process of litigation, through several layers of courts" could not legitimately be viewed as constituting waiver by GAC of that right.

The facts underlying UNC's claim that GAC had by its actions prior to April 2, 1976, waived its right to arbitrate are not disputed. The factual record and the arguments of the parties based upon the undisputed facts have been presented to the Panel in documents submitted by the parties in other proceedings which have been incorporated in the Panel record by reference. In considering this issue we shall first state the facts which are relied upon to establish waiver and then discuss their significance.

The first action brought by UNC in the Santa Fe court named GAC and its constituent partners as defendants. It was filed in the Santa Fe court August 8, 1975, and was removed by the defendants to the United States District Court. After UNC's motion to remand had been argued, UNC voluntarily dismissed the case on December 31, 1975. On the same day UNC filed its second complaint in the Santa Fe court. This complaint was identical with the first except that this one did not name as defendants the partners who owned GAC, thus apparently eliminating diversity jurisdiction in the federal

court. No answer had been filed in that proceeding before it was voluntarily dismissed by UNC and although GAC had obtained extensions of time within which to respond to the complaint, the motions for those extensions asserted that time was necessary to determine whether to seek arbitration.

In the second action in the Santa Fe court GAC filed several motions: a motion to disqualify a particular judge; a motion to dismiss for want of personal jurisdiction; a motion to dismiss for failure to join indispensable parties and a motion for an order extending the time within which to answer and to answer interrogatories that had been served with the complaint. The first motion to dismiss asserted that it was filed "without waiving its right to demand arbitration on all causes and issues raised by UNC herein,". The other motions, with the exception of the motion to disqualify, and for extension of time were accompanied by reservations of the right to arbitrate.

On March 12, after UNC had filed an application in the Santa Fe court for a default judgment on the ground that GAC had not answered UNC's interrogatories, a written agreement was signed wherein GAC agreed to answer the interrogatories within twenty days. Nothing was said in that agreement about reserving arbitration rights. UNC then withdrew its application for a default judgment.

During the period prior to the issuance of the injunction against arbitration, GAC also filed an interpleader action in the United States District Court for the District of New Mexico. The complaint in the interpleader action contained the following reservation:

> "The filing and prosecution of this suit is not intended to or deemed to be a waiver of plaintiffs' rights to have arbitration under one or more of the agreements hereafter described as the UNC Agreements or the 1973 Uranium Supply Agreement, except as to those issues that are within the jurisdiction of and are actually and directly determined by this court."

The defendants were UNC and electric public utilities which had entered into agreements with UNC or GUNF for the purchase of uranium concentrate for use in nuclear reactors in generating plants. The action was dismissed in the District Court and the Tenth Circuit Court of Appeals affirmed *(General Atomic Co.* v. *Duke Power Co.* 553 F.2d. 53 (1957). The affirmance was based upon lack of jurisdiction in that GAC was not being subjected to conflicting claims by two or more defendants which arose out of the same obligation of the plaintiff, and that GAC was therefore not a stakeholder in the federal interpleader sense even though it stood to be subjected to conflicting decisions which might hold GAC liable to the utilities and UNC not liable to GAC.

On March 15, 1976 UNC sought and obtained from Judge Felter a ten-day temporary restraining order prohibiting GAC from instituting suit or filing a third party complaint against United Nuclear involving "any of the subject matters of this suit." Hearing on UNC's application for a preliminary injunction was set to be held within ten days.

On or about March 20, counsel for GAC wrote to UNC counsel "advising plaintiff that Duke Power Company had demanded arbitration with GAC and that GAC might seek to require plaintiff's participation if plaintiff chose not to participate." (See UNC's August 6, 1976, Application for Default Judgment.) In what was apparently the same connection, GAC included in its March 23 response to UNC's March 15 motion for a preliminary injunction, this statement: "In order to protect its interest and to avoid inconsistent results, it will probably be necessary for GAC to implead or otherwise joint UNC in some or all of the actions involving the power companies. . . ." This prospect was discussed in considerable detail at a March 24 hearing before Judge Felter on the application for a preliminary injunction. Counsel for defendant confirmed that GAC, "unless restrained by your Honor, may well take some action in North Carolina to make them OUNCo a party to the arbitration where we are already a party. . . ." (Hearing Transcript, pp. 37-38.) UNC counsel stated

to Judge Felter (Transcript, pp. 17-18): ". . . I don't know in how many unknown places in arbitration and other proceedings UNC will be expected to appear. . . . So I ask that the order be expanded under any proceedings, including an arbitration proceeding."

In response to UNC's request, the preliminary injunction stated:

> "It is therefore ordered that General Atomic Company . . . Oiso hereby preliminarily enjoined and prohibited from filing or prosecuting any other action or actions against United Nuclear Corporation in any other forum relating to any rights, claims or the subject matter of this action. This injunction prohibits the institution or prosecution of ordinary litigation, third party proceedings, crossclaims, arbitration proceedings or any other method or manner of instituting or prosecuting actions, claims or demands relating to the subject matter of this lawsuit, or including United Nuclear Corporation as a party. . . ."

Since the first action filed by UNC was voluntarily dismissed after it had been removed to the federal court, we do not regard anything that occurred during the pendency of that action as significant insofar as waiver of arbitration is concerned. To the extent that what took place in that action is at all relevant the conduct of GAC in that action clearly indicates its preference for a federal rather than a state forum, as well as its desire not to waive its right to arbitrate.

Again, in the second action filed in the Santa Fe court GAC clearly indicated, in its first substantive motion, its desire not to waive its right to arbitrate. That position was reiterated on numerous occasions. We do not regard as essential that a formal reservation of the right to arbitrate in every procedural step be taken in the course of that action. There is no doubt that GAC's reservations were adequate to inform UNC of its consideration of an arbitration panel as an alternative forum and there could be no possible claim of surprise on the part of UNC. Indeed, it was precisely because UNC

anticipated that GAC would resort to arbitration that it requested the injunction prohibiting GAC from doing so.

The interpleader action filed by GAC in the federal district court indicated a desire for a federal forum and particularly for a forum before which both UNC, as the seller to GAC and the utilities as the ultimate purchasers from GAC might be brought so that the possibility of conflicting judgments could be avoided. And in the interpleader action it was specifically stated that if the federal district court accepted jurisdiction over this entire controversy, GAC would abandon its contractual right to arbitration; and equally specifically that this right was being preserved if the court should decline jurisdiction. Closely comparable situations have been presented in a number of other cases. In *General Guaranty Insurance Co.* v. *New Orleans General Agency, Inc.*, (427 F.2d 824, 5th Cir. 1970.) the defendant in an action for alleged breach of contract responded to plaintiff's complaint by answering and at the same time filing a counterclaim that depended on impleading a third party. Recognizing that the interpleader action might or might not be permitted, the defendant expressly reserved its right to arbitrate under its contract with plaintiff if the interpleader suit should be denied. The Fifth Circuit held that the defendant had acted properly in reserving its right to arbitration under the contract if its attempted interpleader action was unsuccessful. In *Gavlik Construction Co.* v. *H. F. Campbell Co.* v. *The Wickes Corp.*, 526 F.2d 777 (3rd Cir. 1975) the court approved the district court finding in *Gavlik Construction Co.* v. *H. F. Campbell Co.*, 389 F. Supp. 551 (W.D. Pa 1975) that the filing of a third-party complaint in an attempt to consolidate pending actions was "certainly not waiver but . . . a procedurally sound attempt to achieve a desired result." (389 F. Supp. at p. 553).

There are two elements in the present case either of which precludes a finding of waiver of GAC's contractual arbitration right on this record as it stood on April 2, 1976. First, there had been no answer filed to UNC's complaint. In

Chatham Shipping Co. v. *Fertex Steamship Corp.*, 352 F.2d 291, 293 (2d Cir. 1965). Judge Friendly summarized the general rule which has subsequently been applied repeatedly, even to alleged waiver by a party plaintiff: "The cases are altogether clear that the mere filing of an action for damages on a contract does not preclude a subsequent change of mind in favor of arbitration therein provided . . .: the earliest point at which such preclusion may be found is when the other party files an answer on the merits. The Belize, 25 F. Supp. 663, 664 (S.D. N.Y. 1938)."

There is also the general rule that neither a plaintiff's nor a defendant's participation in judicial proceedings will be found to have waived a contractual right to arbitration unless such participation has prejudiced the other party. *Careich* v. *Rederi A/B Nordie,* 389 F.2d 692, 696 (2d Cir. 1968) "It is not 'inconsistency' but the presence or absence of prejudice which is determinative of the issue" of waiver. *Hart* v. *Orian Insurance Co.*, 453 F.2d 1358 (10th Cir. 1971); *Shinto Shipping Co., Ltd* v. *Fibrex & Shipping Co., Inc.*, 572 F. 2d 1328 (9th Cir. 1978). Although UNC claims prejudice to its position in GAC's March 12 agreement to answer UNC's interrogatories, resulting in UNC's withdrawal of its motion for a default judgment, this clearly did not constitute the "substantial prejudice" which is consistently held to be a necessary ingredient of a waiver finding.

The four cases described by UNC in its brief as supporting its waiver claim are all cases in which a party first asserted, or at least pressed meaningfully, its contractual arbitration right only after plaintiff's complaint had been answered in a judicial proceeding; in three of the four there had also been preceding combinations of counterclaims, discovery procedures, and arguments and hearings in court on the merits of the controverted issues. *The Belize,* 25 F.Supp. 663 (E.D.N.Y. 1938); *American Locomotive Co.* v. *Gyro Process Co.*, 185 F.2d 316 (6th Cir. 1950); *Cornell & Co.* v. *Barber & Ross Co.*, 360 F.2d 512 (D.C. CIr. 1966); *Weight*

Watches of Quebec Ltd. v. *Weight Watchers International Inc.*, 398 F. Supp. 1057 (E.D.N.Y. 1975).

It is the Panel's determination that GAC has not waived its right to arbitration.

* * *

The Panel will advise the parties through the offices of the American Arbitration Association regarding further proceedings in this case.

/s/ WALTER V. SCHAEFER
/s/ WILLARD WIRTZ

AMERICAN ARBITRATION ASSOCIATION

No. 73-10-0078-77

IN THE MATTER OF AN ARBITRATION BETWEEN GENERAL ATOMIC COMPANY (GAC)

AND

UNITED NUCLEAR CORPORATION (UNC)

Protest And Dissent To Partial Award

Res Judicata, Full Faith And Credit

Waiver Of Arbitration

November 9, 1979

This Protest and Dissent to the "Partial Award" in this matter:

- Continues the protest heretofore made and throughout asserted by United Nuclear Corporation, Respondent, that these proceedings are altogether improper and illegal.
- Preserves the protest heretofore made that the "Partial Award" has been improperly promulgated contrary to fair and proper procedure and in disregard of the rights of the undersigned as a designated arbitrator in this proceeding.
- Asserts the "Partial Award " in form and substance to be in manifest error and disregard of law in that it arrogates powers, prerogatives, and privileges to the arbitrators contrary to fundamental law and public policy, is incomplete and lacking fundamental rationality, and is highly negligent in misrepresentation or neglect of admitted facts and rulings of courts in proceedings of utmost relevance herein.

Contrary to assertions of the "unique full faith and credit question which this matter presents", (Partial Award Pg. 25)* and "problems of interpretation of the Supreme Court opinion" (Partial Award Pg. 13), this matter is altogether plain and straightforward.

The United States Supreme Court in Felter I immediately reached the issue and its decision:

> "General Atomic Company (GAC) challenges the validity of an injunction issued by a New Mexico state court restraining it from filing and prosecuting actions against United Nuclear Corporation (UNC) in federal court. We reverse because under Donovan v. City of Dallas, 377 U.S. 408, 84 S.Ct. 1579, 12 L.Ed.2 409 (1964), it is not within the power of state courts to bar litigants from filing and prosecuting in personam actions in the federal courts." (98 S.Ct. 76)

The judgment of the Supreme Court accordingly was:

> "The judgment of the New Mexico Supreme Court is reversed and the case is remanded to that court for further proceedings not inconsistent with this opinion." (98 S.Ct. 79)

Nothing suggests the New Mexico state court's admitted jurisdiction (Partial Award Pg. 24) had been forfeited and the court had become "coram non judice".

Felter II came before the United States Supreme Court as one of three proceedings instituted by GAC, all in March 1978. Full details as to the three proceedings, Nos. 77-1236, 77-1237, 77-1269, are provided in Appendix 1, attached.

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* References are to Partial Award, P.A. or Schaefer, Pg. _____; United Nuclear Corporation — UNC; General Atomic Company — GAC; Gulf Oil Company — Gulf; Felter I — (*GAC* v. *Felter*, 434 U.S. 12; 98 S.Ct. 76; 54 L.Ed.2 199 (1977); Felter II — (*GAC* v. *Felter*, 436 U.S. 493; 98 S.Ct. 1939; 56 L.Ed.2 480 (1978); Judge Edwin L. Felter now Justice Edwin L. Felter of the New Mexico Supreme Court.

Suffice it to say:

No. 77-1236 was a Petition for Certiorari to review an order of the Supreme Court of New Mexico entered January 11, 1978 denying a Writ of Prohibition to an order entered by Judge Felter on November 18, 1977 requiring the identification of the "Canadian documents".

No. 77-1237 was a motion of GAC for Leave to File a Petition for Mandamus requiring Judge Felter to vacate the orders of December 16, 1977 staying federal arbitration proceedings and December 27, 1977 declining to stay trial proceedings in New Mexico District Court pending prosecution of federal arbitration on the grounds that rights of arbitration had been waived by GAC and the issues were not subject to arbitration since they were intertwined with violations of the New Mexico State antitrust laws.

No. 77-1269 was a Petition for Certiorari to review an order of the Supreme Court of New Mexico on March 2, 1978 denying GAC's application for original mandamus and prohibition to the entry of a sanctions order and default judgment entered by Judge Felter on March 2, 1978.

All three proceedings were held "in tandem on a conference list". The briefs filed by the parties dealt with the consolidated issues and accordingly the United States Supreme Court was fully aware that the docket in the New Mexico state courts included two final orders then pending on appeal to the New Mexico Supreme Court.

On May 15, 1978, the United States Supreme Court denied certiorari in 77-1236, The Canadian Documents, and in 77-1269 The Sanctions Order and Default Judgment.

Parenthetically, 77-1269 has now been fully briefed and argued before the Supreme Court of New Mexico as Case No. 11988 and No. 12052, consolidated, and awaits decision.

On May 30, 1978, in Felter II, the United States Supreme Court granted Leave to File Mandamus against the December

16 order staying arbitration but refused mandamus as to the December 27 order declining to stay trial proceedings pending arbitration.

The December 27 order was thereafter reviewed by the New Mexico Supreme Court in Case No. 11775 and affirmed on May 7, 1979, _____ N.M. _____, 597 P.2d 290, and certiorari denied by the United States Supreme Court on October 9, 1979 in Case No. 79-190.

Felter II is easily understood against this background. There, the United States Supreme Court directed that the order of December 16, 1977 be vacated or modified:

> "to the extent that it places any restriction whatsoever upon GAC's exercise of its right to litigate arbitration claims in federal forums." 436 U.S. at 497; 98 S.Ct. at 1941

However, as to the issues of arbitrability and waiver, the Supreme Court said:

> "Clearly our prior opinion did not preclude the court from making findings concerning whether GAC had waived any right to arbitrate or whether such a right was contained in the relevant agreements nor did our prior decision prevent the Santa Fe Court on the basis of such findings from declining to stay its own trial proceedings as requested by GAC pending arbitration in other forums." id.

"Preclude" is successor to the old common law plea of precludi non, "the commencement of a replication to a plea in bar, by which the plaintiff says that . . . he *ought not to be barred* from having and maintaining his aforesaid action." The modern preclude, accordingly, is to prohibit or prevent. (Black's Law Dictionary 1060 (5th ed. 1979)

Thus, the United States Supreme Court, with full knowledge of the record in the New Mexico courts, declined to interfere with the pending judicial review by the New Mexico Supreme Court of the December 27, 1977 order, plainly saying its prior

opinion did not prevent the Santa Fe court, on the basis of its findings as to waiver and inarbitrability, from declining to stay its own trial proceedings.

The commentator in 54 L.Ed.2 925 had no problem in interpreting Felter II:

> "And in General Atomic Co. v Felter (1978, US) 56 L.Ed.2 480, 98 S.Ct. 1939, the Supreme Court granted a corporation's motion for leave to file a petition to mandamus a state court with regard to its order staying federal arbitration proceedings by the petitioner against another corporation, on the ground that the order violated the mandate of the Supreme Court in a prior decision in which the Supreme Court had held that under the supremacy clause of the Federal Constitution (Article VI, clause 2), the state court lacked the power to enjoin the petitioner from filing and prosecuting in personam actions in the federal courts. The stay order in question was made after the state court, on remand following the Supreme Court's earlier decision in the case, had modified its injunction to exclude from its terms and conditions all in personam actions in federal courts and all other matters mandated to be excluded from the operation of the injunction by the Supreme Court's opinion. Noting that the state court was not precluded by the Supreme Court's prior decision from making findings concerning whether the petitioner had waived any right to arbitrate or whether such a right was contained in a relevant agreement between the petitioner and the second corporation, and that the state court was not prevented, on the basis of such findings that it might make, from declining to stay its own trial proceedings pending arbitration in other forums, the Supreme Court ruled nonetheless that the state court was without power to interfere with the petitioner's efforts to obtain arbitration in federal forums. The Supreme Court, however, declined to issue a formal writ of mandamus, assuming that its previous judgment would be obeyed by the state court by

promptly vacating or modifying its order staying arbitration proceedings to the extent that it placed any restriction whatever on the applicant's exercise of the right to litigate arbitration claims in federal forums."

The elaborate explanation in the "Partial Award" that the preclude paragraph must be understood as defining postural procedural limits of mandamus (Partial Award Pgs. 13 et seq.) is patently wrong, unnecessary, and oblique.

If the panel had carefully read *Donovan* v. *City of Dallas*, 377 U.S. 408 (1963), they would have learned the issue before the court was *only* the power of the state court to enjoin an action in federal court:

"Early in the history of our country a general rule was established that state and federal courts would not interfere with or try to restrain each other's proceedings. That rule has continued substantially unchanged to this time. An exception has been made in cases where a court has custody of property, that is, proceedings in rem or quasi in rem. In such cases this Court has said that the state or federal court having custody of such property has exclusive jurisdiction to proceed. Princess Lida v. Thompson, 305 U.S. 456, 465-468. In Princess Lida this Court said "where the judgment sought is strictly in personam, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other." Id., at 466. See also Kline v. Burke Construction Co., 260 U.S. 226. It may be that a full hearing in an appropriate court would justify a finding that the state-court judgment in favor of Dallas in the first suit barred the issues raised in the second suit, a question as to which we express no opinion. But plaintiffs in the second suit chose to file that case in the federal court. They had a right to do this, a right which is theirs by reason of congressional enactments passed pursuant to congressional policy. And whether or not a plea or res judicata in the second suit

would be good is a question for the federal court to decide. While Congress has seen fit to authorize courts of the United States to restrain state-court proceedings in some special circumstances, it has in no way relaxed the old and well-established judicially declared rule that state courts are completely without power to restrain federal-court proceedings in in personam actions like the one here."

Donovan recognized that even though the injunction was invalid the Texas court retained jurisdiction.

"Whether the Texas court would have punished petitioners [respondents here] for contempt had it known that the restraining order petitioners violated was invalid, we do not know. However, since that question was neither considered nor decided by the Texas court, we leave it for consideration by that court on remand. We express no opinion on that question at this time."

In fact, the return of the Donovan fine subsequently was by order of the Court of Civil Appeals of Texas, 384 S.W.2 724 (1964).

GAC argued this precise issue without success before the New Mexico Supreme Court in the appeal from the December 27 order, 597 P2d. 290 at 309.

"5. Inconsistency of Proceedings

[33] GAC claims that the actions of the trial court were inconsistent with the holdings of the U. S. Supreme Court in General Atomic Co. v. Felter, 434 U.S. 12, 98 S.Ct. 76, 54 L.Ed.2d 199 (1977). This bears on the district court's determination not to stay the trial on the grounds that GAC had waived its right to arbitrate and that the New Mexico antitrust claims were not arbitrable as a matter of law.

In General Atomic, the Supreme Court ruled that, "it is not within the power of state courts to bar litigants from filing and prosecuting in personam actions in the federal

courts." 434 U.S. at 12, 98 S.Ct. at 76. The district court then modified its April 2, 1976 injunction to exclude from its terms and conditions all in personam actions in federal courts "and all other matters mandated to be excluded from the operation of said preliminary injunction by the Opinion of the United States Supreme Court, dated October 31, 1977."

The district court had jurisdiction over the arbitration controversy under the Federal Arbitration Act, at least up to approximately sixty days into the trial of the case on the merits, when GAC made demand for arbitration and moved for a stay in the proceedings. When GAC sought a stay the trial court had the obligation to determine whether the issues involved in the suit were referable to arbitration under the agreements, and whether "the applicant for the stay is not in default in proceeding with such arbitration. . . ." 9 U.S.C. §3. The trial judge made these determinations in favor of UNC. There is nothing in the Supreme Court's decision that prohibits this type of disposition since it comports with the federal statutes.

[34] There was nothing in the amended injunction which prohibited GAC from demanding arbitration in the case to be conducted in any location, so long as an application was made to the district court to stay the pending trial. The Federal Arbitration Act prevented GAC from proceeding with arbitration without an order from Judge Felter. 9 U.S.C. §3.

Furthermore, in General Atomic Co. v. Felter, 436 U.S. 493, 496-97, 98 S.Ct. 1939, 58 L.Ed.2d 480 (1978), decided after argument in this case, the Court observed: "Clearly, our prior opinion did not preclude the court from making findings concerning whether GAC had waived any right to arbitrate. . . . Nor did our prior decision prevent the Santa Fe court . . . from declining to stay its own trial. . . ." "

Elemental research and simple due care would have demonstrated that it was the responsibility of Justice Felter to

determine arbitrability. The panel is aware that diversity of citizenship was lacking between the parties until sometime in 1979; the "Partial Award" contains pages discussing the Bratton decision which determined federal court jurisdiction lacking. (Partial Award, Pg. 15 et seq.)

With minimum effort, the panel could have found Commercial Metals v. Balfour, Guthrie, & Co. Ltd. (577 F.2d 264, CCA5 (1978). In *Commercial,* as here, diversity of citizenship did not exist. There, as here, the state court was able as well as required to apply the United States Arbitration Act.

> "[6] It is clear that the state courts are entirely able, as well as required, to apply the United States Arbitration Act and compel arbitration pursuant to the Act if the statutory requisites are present. Coastal States Gas Producing Co. v. Producing Properties, 203 F.Sup. 956 (S.D.Tex.1962). Indeed, at the request of the parties, we allowed the parties to communicate to the Court, after oral argument, in regard to ongoing state proceedings in which an order compelling arbitration has been sought. It appears to us that the state court is conscientiously fulfilling its duty in deciding the applicability of the Federal Arbitration Act, although, of course, we are not at liberty to speculate as to the correctness of such a determination. We refuse to allow every arbitration agreement concerning a maritime transaction or one involving interstate and foreign commerce to come within the jurisdiction of our district courts through an indirect method that was directly prohibited by Congress. We join the other courts which have considered the matter, and have required an independent jurisdictional basis, Robert Lawrence Company v. Devonshire Fabrics, Inc., suprs; Amalgamated Ass'n, Etc. v. Southern Busline, supra; Warren Bros. Co. v. Community Bldg. C. of Atl., Inc. 386 F.Supp. 656 (M.D.N.C. 1974); C.P. Robinson Const. Co. v. National Corp. for Hous. Part., 375 F.Supp. 446 (M.D.N.C. 1974); Bangor and Aroostock R. Co. v. Maine Central R. Co., supra; Coastal States Gas Producing Co. v. Produc-

> ing Properties, supra, and have refused to fragment the Arbitration Act. Robert Lawrence Company v. Devonshire Fabrics, Inc., supra; Bengor and Aroostock R. Co. v. Maine Central R. Co., supra; Coastal States Gas Producing Co. v. Producing Properties, supra." (577 F.2 264 at 269 (1978))

It will be noted hereafter state courts do pass upon federal rights and those findings are thereafter, as here, entitled to full faith and credit and res judicata.

On remand of 77-1237, the matter came before the New Mexico Supreme Court in Case No. 11775 on June 21, 1978 whereupon Mr. Justice Payne asked John Eastham, Esq., counsel to GAC:

> "Justice Payne: But they didn't decide that the Santa Fe Court has no power to determine if there had been a waiver of that right?
>
> Mr. Eastham: They did not determine that the December 27th Order, which went into waiver, was or was not proper. That is definitely before you gentlemen:"

The "coram non jucide" argument was made fully in the supplemental briefs as it was made thereafter in the Petition and brief for Certiorari to the United States Supreme Court. On May 9, 1979 the New Mexico Supreme Court affirmed the December 37, 1977 order in a full opinion of twenty-three pages, _____ N.M. _____, 597 P.2d 290. This court found not only that GAC had waived its right to arbitrate *but that the issues of violations of the New Mexico anti-trust laws were intertwined with all other issues and not subject to arbitration.* id 309.

The decision was clearly stated in U. S. Law Week 43 L.W. 3236, (Partial Award, Pg. 23) which appeared at the time the

United States Supreme Court denied GAC's Petition for Certiorari:

> "Arbitration — No. 79-190 General Atomic Co. v. United Nuclear Corp. — Ruling below (NM Sup.Ct., 5/7/79):
>
> Federal Arbitration Act, 9 U.S.C. §3, mandates that court in which case is pending and in which stay is requested for arbitration has jurisdiction to determine whether movant is "in default and proceeding with such arbitration"; thus state court, rather than arbitration panel, could decide whether party had waived its rights to arbitration; court will take into consideration all material facts to determine whether party to uranium supply contracts containing arbitration caluse defaulted on its obligation to make timely demands for arbitration and stay of state-court proceedings and thus waived its rights; substantial evidence supports finding that contracting party, which waited until complex, multi-party, multi-issue litigation in which it was involved was within days of final solution at trial level when it first made demand for arbitration, was in default and thus waived its right to arbitration; enforcement of state antitrust laws by courts rather than by arbitrators is entirely consistent with congressional intent, since state and federal antitrust acts serve to protect same societal interest, and since Federal Arbitration Act itself provides that aribtration agreements in contracts involving commerce are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract."

Compare the "Partial Award" summary of the May 7, 1979 Decision of the New Mexico Supreme Court:

> "The December 27, 1977 judgment which refused to stay the trial on the ground that GAC had waived its rights to arbitration was affirmed by the Supreme Court of New Mexico on May 7, 1979, and GAC's petition for certiorari to review that judgment has been denied by the

> Supreme Court of the United States." (Partial Award, Pg. 23)

The error in this summary, particularly after citation to U. S. Law Week, is astounding, negligent, and wholly malignant.

The "coram non judice" argument is confined entirely to waiver.

> "So whatever occurred between April 2, 1976 and November 30, 1977, while GAC was vindicating its contractual right to arbitrate by "a lengthy process of litigation, through several layers of courts" could not legitimately be viewed as constituting waiver by GAC of that right." (Partial Award, Pg. 29)

Non-arbitrability of the issues in this proceeding because of the New Mexico anti-trust law has been asserted by UNC from the inception of the controversy between the parties.

Conclusions of fact 9 and 11 and conclusions of law 7 and 8 of the New Mexico District Court Order of December 27, 1977 found anti-trust issues inarbitrable and all issues in the case so intertwined that none could be submitted to arbitration.

The May 7, 1979 Decision of the New Mexico Supreme Court specifically considered these issues at length and affirmed these conclusions.

The Petition for Certiorari filed by GAC in the United States Supreme Court assigned these rulings as grounds for granting the Writ.

The "Partial Award" of the panel enumerates these issues as preliminary and before the panel. Nevertheless, the "Partial Award" does not consider or even mention these issues at all.

— The res judicata claim of UNC included the anti-trust and intertwinement issues as the panel was fully aware. It is altogether improper and in manifest disregard of law for the res judicata claim to be considered or determined dehors these matters.

— The facts and law relating to the anti-trust and intertwinement issues existed prior to the institution of this litigation, prior to the April 2, 1976 injunction, were in no way affected by that injunction, and cannot be reached by any "coram non judice" consideration.

— The public policy of New Mexico is that issues arising under the New Mexico anti-trust statutes and intertwined matters are to be determined by courts and not by privately paid per diem arbitrators, 597 P.2d.290 at 311. This fundamental policy is now disregarded by the panel in its wholly invalid assertion of jurisdiction.

— The "Partial Award" denying res judicata and full faith and credit without consideration of the anti-trust and intertwinement issues is not only incomplete and lacking fundamental rationality but is in manifest disregard of law and contrary to public policy. In fact, any lawyer for any party in this proceeding undertaking to argue the res judicata issue would be guilty of gross malpractice if he were to ignore the anti-trust and intertwinement issues.

The direct decisions described involving the precise parties and issues now appearing and asserted before the arbitration panel are cavalierly noted and dismissed with the comment that the Denial of Certiorari carries:

> "no implication or inference concerning that court's view of the merits of the case" (Partial Award Pg. 23).

On June 6, 1979, N. Lewin, Esq., counsel to GAC, wrote to the panel concerning the May 7, 1979 Supreme Court of New Mexico Decision; he stated:

> "GAC will be filing a Petition for a Writ of Certiorari with the Supreme Court of the United States to obtain review of the New Mexico Supreme Court's recent decision. Because the New Mexico decision rests on fundamental errors of federal statutory and constitutional

> law, we are confident that it will be reversed. The time it takes to secure such reversal should not, however, be utilized to delay rulings by this Panel on "preliminary" issues which have long been ripe for decision or to postpone further sessions going to the merits. If this arbitration is now delayed while the validity of the New Mexico decision is being contested by GAC in the Supreme Court of the United States, the effect will be the same as if Judge Felter's stay order of December 16, 1977, and his injunction against arbitration of April 2, 1976 — both vacated summarily by the United States Supreme Court — were still operative." (Appendix 3 attached)

This arbitrator has been particularly interested in hearing the views of the parties as to the three events which occurred subsequent to the March hearings before the panel:

- The affirmance on May 7, 1979 by the New Mexico Supreme Court of the December 27 order of Judge Felter,
- The determination by Judge Enright permitting the filing of the amended complaint in San Diego District Court on August 31, 1979.
- The Denial of Certiorari by the United States Supreme Court on October 9, 1979.

Unfortunately, upon objection, this opportunity has been denied.

While it is true that the Denial of Certiorari by the United States Supreme Court does not create stare decisis, the basic fact is that as between the parties the decision of the New Mexico Supreme Court remains in full force and effect. *Grossgold* v. *Supreme Court of Illinois*, 557 F.2d. 122, CCA7, 1977 at 124,:

> "The Illinois Supreme Court, which is fully competent to pass on federal constitutional questions, has passed upon this constitutional question, and its decision became final

> when the Supreme Court of the United States denied certiorari. Since the Illinois Supreme Court was bound to pass on the constitutional question posed by the pardon, the court's denial of Grossgold's petition for reconsideration necessarily implied that the constitutional question was being decided against the plaintiff. Consequently, there was no arguable constitutional "deprivation" upon which Section 1343 could operate to provide subject matter jurisdiction. The doctrine of res judicata bars any further litigation of this question.
>
> * * *
>
> We conclude that plaintiff pursued his proper remedy in the Supreme Court of Illinois and subsequently in the Supreme Court of the United States and is bound by the adverse result." 557 F.2d. 122 at 125

Brown v. Allen, 344 U.S. 443; 73 S.Ct. 397, often cited for the proposition that the denial of certiorari "imports no expression of opinion upon the merits of a case" went further, however, to describe the effect as between the parties:

> "But denial of certiorari marks final action on state criminal proceedings. In fields other than habeas corpus with its unique opportunity for repetitious litigation, as demonstrated in Dorsey v. Gill, 80 U.S. App.D.C. 9, 148 F.2d 857, see 7 F.R.D.313, the denial would make the issues res judicata."

Another inexcusable error in the "Partial Award" occurs in its assertion:

> "The other judgments of the Santa Fe court are pending upon appeal in the Supreme Court of New Mexico. They do not directly bear upon GAC's right to federal arbitration or the Santa Fe court's jurisdiction to prevent the exercise of that right." (Partial Award, Pg. 23)

The "other judgment" is the sanctions order finding the 1973 Supply Agreement under which *the right of arbitration is asserted* void and unenforceable. (Partial Award, Pgs. 9 et seq.)

Inherent in the "Partial Award" analysis are:

1. Assumption of a non-existent arbitrable right of judicial review of a judgment and decree entered by a state court, affirmed by the court of last resort of that state after full briefing, argument, and review, and to which the United States Supreme Court, again after full briefing, has denied certiorari. This ennoblement is undertaken by an arbitration panel consisting of paid per diem private citizens, acting on its own behalf, appointed by private corporations acting pursuant to a private contract; thus setting up what one panel member tastefully referred to as the "private jurisprudential system" or "second system of jurisprudence". (San Diego Transcript of Proceedings, March 28, 1979, Pg. 253).

This pretension of authority is breathtaking. In *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 at 414; 44 S.Ct. 149 (1923), plaintiffs filed a Bill in Equity in U. S. District Court for the District of Indiana seeking

> "to have a judgment of a circuit court in Indiana which was affirmed by the Supreme Court of the state declared null and void."

There as here, an attempt at direct review by the Supreme Court of the United States had failed. Mr. Justice Van Deventer, speaking for a unanimous court, affirmed a decree dismissing the complaint:

> "It affirmatively appears from the bill that the judgment was rendered in a cause wherein the circuit court had jurisdiction of both the subject matter and the parties, that a full hearing was had therein, that the judgment was responsive to the issues, and that it was affirmed by the Supreme Court of the state on an appeal by the plaintiffs. 131 N.E. 769. If the constitutional questions stated in the bill actually arose in the cause, it was the province and duty of the state courts to decide them; and their decision,

> whether right or wrong, was an exercise of jurisdiction. If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceedings. Unless and until so reversed or modified, it would be an effective and conclusive adjudication. Elliott v. Peirsol, P. Pet. 328, 340, 7 L.Ed. 164; Thompson v. Tolmie, 2 Pet. 157, 169, 7 L.Ed. 381; Voorhees v. Bank* of United States, 10 Pet. 449, 474, 9 L.Ed. 490; Cornett v. Williams, 20 Wall. 226, 249; Ex parte Harding, 120 U.S. 782, 7 S.Ct. 780, 30 L.Ed. 824. Under the legislation of Congress, no court of the United States *other than this court* could entertain a proceeding to reverse or modify the judgment for errors of that character." (Emphasis provided)

Thus, this arbitration panel pretends to authority which no court of the United States, other than the United States Supreme Court possesses.

The extent of this unwarranted pretension is shown in the "Partial Award" itself. Pages 29-37 of the "Partial Award" consider the identical problem of waiver dealt with at length in the opinion of the New Mexico Supreme Court. See 597 P.2d. 290 at 299 et seq.

The "second jurisprudence" doctrine suggests a further interesting alternative. In Deane Hill Country Club, Inc. v. City of Knoxville, 379 F.2d 321, CCA6, 1967, Cert. Denied 389 U.S. 991, plaintiffs filed an action in the U. S. District Court challenging an annexation proceeding previously sustained in state court and affirmed by the state Supreme Court. Again, as here, certiorari was denied by the United States Supreme Court. The 6th Circuit Court of Appeals affirmed the dismissal of the complaint saying:

> "State courts are competent to decide questions arising under Federal Constitution. Federal courts do not provide a forum in which disgruntled parties can relitigate federal claims presented to and decided by state courts."

Apparently "second jurisprudence" is more hospitable in providing a forum "in which disgruntled parties relitigate federal claims presented to and decided by state courts."

The panel, in fact, proceeds beyond the position asserted by counsel for GAC. In *Durfee* v. *Duke,* 375 U.S. 106; 84 S.Ct. 242, (1963), the court considered the requirement of full faith and credit and concluded at Pg. 149:

> "There emerges the general rule that a judgment is entitled to full faith and credit — even as to questions of jurisdiction — when the second court's inquiry discloses that these questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment."

At San Diego, before this panel, counsel for GAC was asked what application he saw for *Durfee* v. *Duke* (San Diego Transcript, March 28, 1979, Pg. 222):

> "Mr. Lewin: In addition to the fact that Durfee versus Duke involved a jurisdictional determination that had been approved by the Highest Court of the State and for which no Petition for Certiorari had been filed. In other words, a parallel. *If UNC were here and this state court injunction had been affirmed by the New Mexico Supreme Court, and the Supreme Court of the United States had denied certiorari, then we'd agree, Durfee versus Duke would be applicable.* It would say that the state judge had jurisdiction to issue his order." (Emphasis supplied)

The "private jurisprudential system" makes no distinction between direct and collateral attack upon a judgment. Certainly a pretense by a private arbitration panel to void a judgment of a court of last resort of one of the sovereign states must appear collateral unless it be claimed that by some unknown arcane process state and federal constitutions had been amended to confer appellate judicial status upon this private entity. Otherwise, *Gordon* v. *Longest,* (16 Peters 97), *Evans* v. *Hudson,* 165 Fed 970 (CA3, 1948), and *Harper* v.

Tandy, 543 F.2d 540, (CA5, 1976), all involving direct review, are inapplicable.

Stoll v. *Gottlieb*, 305 U.S. 165; 83 L.Ed 104 (1938), reads directly on the point. There the federal court in a corporate bankruptcy proceeding discharged an individual from liability under his guarantee of a corporate obligation. The bondholder subsequently sued in the municipal court in Chicago. Municipal court held for the bondholder on the basis that the federal court had no jurisdiction. The Appellate Court reversed and its judgment was in turn reversed by the Supreme Court of Illinois. The United States Supreme Court reversed saying:

> "That a former judgment in a state court is conclusive between the parties and their privies in a Federal court when entered upon an actually contested issue as to the jurisdiction of the court over the subject matter of the litigation, has been determined by this Court in Forsyth v. Hammond. The respondent, Caroline M. Forsyth, sought by injunction in the Federal court to forbid the City of Hammond from collecting taxes on certain lands, annexed to the city by an earlier state court decree. The city contended that the earlier decree was decisive, the respondent that it was void because the enlargement of a city was a matter of legislative, not judicial, cognizance. Without determining the issue whether annexation itself is a function solely of the legislature. this Court upheld the contention of the city on the ground that the respondent had taken an appeal to the Supreme Court of Indiana from the earlier decree of the trial court against her in the annexation proceedings, and had in that appeal attacked the validity of the decree on the ground of lack of jurisdiction. "Having litigated a question in one competent tribunal and been defeated, can she litigate the same question in another tribunal, acting independently, and having no appellate jurisdiction? The question is not whether the judgment of the Supreme Court would be conclusive as to the question involved in another action

> between other parties, but whether it is not binding between the same parties in that or any other forum."

Also see Moore's Federal Practice, (2d ed. 1975)60.25(2) at 296.

The law of this case itself as made by the parties demonstrates the inapplicability of Kalb v. Feuerstein, 438 U.S. 433 (1940). In the actions brought by UNC in federal district court in New Mexico and again initially in the federal district court for the Southern District of California at San Diego, federal jurisdiction was alleged on the basis of the Federal Arbitration Act. GAC successfully moved in each instance to dismiss on the grounds that the Federal Arbitration Act per se does not confer federal jurisdiction (See Appendix 2).

In contrast, *Kalb* arose under the National Bankruptcy Power where the court concluded:

> "The language and broad policy of the Frazier-Lemke Act conclusively demonstrate that Congress intended to and did deprive the Wisconsin County Court of the power and jurisdiction to continue or maintain in any manner the foreclosure proceedings against applicants without the consent, after hearing, of the bankruptcy court in which the farmers petition was then pending."

and the court explained its decision by saying:

> "It is generally true that a judgment by a court of competent jurisdiction bears a presumption of regularity and is not thereafter subject to collateral attack. But Congress, because its power over the subject of bankruptcy is plenary, may by specific bankruptcy legislation create an exception to that principle and render judicial acts taken with respect to the person of property of a debtor whom the bankruptcy law protects nullities and vulnerable collaterally. Although the Walworth County Court had general jurisdiction over foreclosures under the law of Wisconsin, a peremptory prohibition by Congress in the exercise of its supreme power over bankruptcy that no

> State court have jurisdiction over a petitioning farmer-debtor of his property, would have rendered the confirmation of sale and its enforcement beyond the County Court's power and nullities subject to collateral attack. The States cannot, in the exercise of control over local laws and practice, vest State courts with power to violate the supreme law of the land. The Constitution grants Congress exclusive power to regulate bankruptcy and under this power Congress can limit the jurisdiction which courts, State or Federal, can exercise over the person and property of a debtor who duly invokes the bankruptcy law. If Congress has vested in the bankruptcy courts exclusive jurisdiction over farmer-debtors and their property, and has by its Act withdrawn from all other courts all power under any circumstances to maintain and enforce foreclosure proceedings against them, its Act is the supreme law of the land which all courts — State and Federal — must observe. The wisdom and desirability of an automatic statutory ouster of jurisdiction of all except bankruptcy courts over farmer-debtors and their property were considerations for Congress alone."

Two cases arising under the National Railroad Bankruptcy Act, enacted by the Congress pursuant to the bankruptcy power as was the case with Frazier-Lemke, determine awards made by arbitrators acting pursuant to the Federal Arbitration Act are of no effect against the bankruptcy trustee: *Penn Central Transportation Co.* v. *National Railroad Passenger Corp.*, 560 F.2d. 169, (CCA3 1977) and *National Railroad Passenger Corp.* v. *Blanchette,* 551 F.2d 127, (CCA7 1977), Cert Denied 434 U.S. 856.

The law of this case thus as made by the parties not only demonstrate *Kalb* inapplicable but also determines that rights under the Federal Arbitration Act do not per se confer jurisdiction upon the federal courts or oust the state courts of jurisdiction.

The "second jurisprudence" indeed achieves a peculiar jurisdictional position on its own in relation to the federal

courts of this country. Thus, five pages (See Pg. 18-23) are devoted to the proceedings pursuant to Rule 19B of the Federal Rules of Civil Procedure in the U. S. District Court of New Mexico all overtaken by subsequent events first described, incidentally, in hearing before this panel discussing the reshuffling of interests in GAC between Gulf and Scallop. The fact that this "buy-out" has been held by the Federal District Court in San Diego to create presumptive diversity and thus develop federal subject matter jurisdiction is not even acknowledged even though the panel members themselves are parties to this proceedings and appear before that Federal District Court (Appendix 2 attached)

The pompous, corroding error is the misconception of the prerogatives and function of the panel itself. While GAC and UNC will, for understandable reasons of self-interest, dispute and contest, the proper interpretation of the mandate and decisions of Federal and State courts of last resort and review as well as Federal and State Rules of Civil Procedure are matters of public law not contract between the parties. That issue is, of course, not new. See Mr. Justice Powell in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 56; 94 S.Ct. 1011 at 1022:

> "As the proctor of the bargain, the arbitrator's task is to effectuate the intent of the parties. His source of authority is the collective-bargaining agreement, and he must interpret and apply that agreement in accordance with the "industrial common law of the shop" and the various needs and desires of the parties. The arbitrator, however, has no general authority to invoke public laws that conflict with the bargain between the parties: "[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brant of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation,

courts have no choice but to refuse enforcement of the award." United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 594, 597. 80 S.Ct. 1358, 1361, 4L.Ed.2d 1424 (1960).

Mr. Justice Powell quoted Dean Shulman:

"A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties. He serves their pleasure only, to administer the rule of law established by their collective agreement." Shulman, Reason, Contract, and Law in Labor Relations, 68 Harv.L.Rev. 999, 1016 (1955).

Also see Professor Bernard Meltzer, 43 Chi.L.Rev. 724 (1977) at 730:

"As the Supreme Court observed in Gardner-Denver, those ingredients of arbitration that make it such a valuable adjunct to a system of private ordering, compromise it as an instrument of important public purposes. These ingredients are arbitration's informality, its privacy, its emphasis on finality at the trial level, the ad hoc recruitment of its personnel, and the ecumenical nature of their credentials. Arbitrators, no matter how great their individual competence, lack the institutional credentials that give moral authority to the decisions of the federal judiciary. That authority arises from a complex of tradition and process, including selection processes, the solemnity with which judges typically function, the publicity of their forum, the respectability and expectation of appellate review, and lifetime tenure. Indeed, there is an ironic twist in attempting to provide by contract that ad hoc arbitrators — the most ephemeral of adjudicators — should have the same authority as life-tenured federal judges."

Concern is expressed lest "judgments of the Supreme Court of the United States are to be treated as meaningless gestures" (Partial Award, Pg. 28). The rhetoric is curious. That court denied mandamus to the December 27, 1977 order at the time the court knew from the record before it that this order and the accompanying gargantuan record would be reviewed by the Supreme Court of New Mexico. Following affirmance the Supreme Court denied certiorari knowing that the effect of denial would leave the judgment in full force and effect between the parties. The course suggested for the "second jurisprudence" is not only to make these direct judgments and orders entered after full briefing, argument, and consideration, meaningless; but, in addition, to sanction for GAC double-scoop litigation. The technique is neither new nor commendable. See Mr. Justice Reed in Stoll v. Gottlieb, supra:

> "Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first."

* * *

Pursuant to Sections Ten and Eleven of the United States Arbitration Act the "Partial Award" must be vacated, modified, and corrected. The "Partial Award" was improperly promulgated, is beyond the powers of the arbitrators, arrogates to arbitrators illegal and non-existent rights to review and disregard and, in effect, to assert appellate jurisdiction over judgments and decrees of state courts of general jurisdiction, which judgments and decrees have been affirmed after full review by the state court of last resort, and to which affirmance the United States Supreme Court has denied certiorari.

In promulgating the "Partial Award", the arbitrators have imperfectly executed their responsibilities in disregarding and ignoring essential, relevant matters and issues before the panel.

The "Partial Award" is based upon manifest errors and disregard of law. The "Partial Award" must be vacated and then modified and corrected to dismiss these proceedings as provided by law.

APPENDIX E

No. 73 10 0078 77

In the Matter of an Arbitration Between
GENERAL ATOMIC COMPANY
and
UNITED NUCLEAR CORPORATION

Final Award

RECEIVED
(September 12, 1980)
AMERICAN ARBITRATION
SAN DIEGO

During the five years this controversy has been carried through a succession of state and federal courts, twice to the Supreme Court of the United States, there has been no decision on the merits of the underlying issues in dispute. They emerge now as relatively plain and straightforward.

The dispute had its origin in five long term contracts entered into during the period 1966 to 1971 between United Nuclear Corporation (UNC) as producer and seller of uranium, and four electric utility companies as purchasers. As a result of transactions that will be described, UNC became obligated to supply the uranium to General Atomic Corporation (GAC) and GAC became obligated to supply it to the utilities. In August of 1975 UNC stopped making deliveries of uranium and instituted litigation which is still unconcluded.

The Partial Award issued by this Panel on November 14, 1979 recounts the history that preceded it. UNC maintained before the Panel at that stage of the proceedings that the entire matter had been rendered res judicata by decisions of the courts of New Mexico. Following a full hearing on those preliminary issues in March of 1979, the Panel ruled in its

Partial Award that it had jurisdiction to proceed to a determination of the underlying issues on their merits.

Before we discuss the merits of the dispute, it is necessary to state certain further procedural developments.

UNC has refused to accept the Panel's jurisdictional determination. On the last day of the Panel's March, 1979 hearings, UNC filed a complaint for an injunction in the United States District Court for the Southern District of California, seeking to restrain the Panel from proceeding. The complaint was dismissed for want of jurisdiction, as were successive amended complaints and an additional action instituted by UNC. These matters are now pending in the United States Court of Appeals for the Ninth Circuit.

The Panel convened a session on March 24, 1980 to set a schedule for hearings on the merits. Arbitrator Julian H. Levi, member of the Panel appointed by UNC, stated at this session that other professional commitments precluded his participation in further hearings until the middle of June, and UNC counsel insisted to the Panel that UNC "will object violently to being deprived of the services of our arbitrator." Hearings on the merits of the issues in controversy, as they had previously been identified by the parties, were therefore set to begin on June 16, 1980 and to continue, if necessary, through July 11th.

On Friday, June 13th, three days before the start of the scheduled hearings, the American Arbitration Association (AAA) regional office in San Diego, where the hearings were to be held, received two telephone calls. One, from UNC counsel, was to advise that UNC would not participate in the hearings. The other, from Arbitrator Levi, was that he was resigning.

As the hearings opened on June 16, with neither UNC nor Arbitrator Levi present, a UNC emissary appeared only for the purpose of handing to the Panel Chairman and to Arbitrator Willard Wirtz (member of the Panel appointed by GAC) identical letters, signed by UNC Counsel Donnan Stephenson and addressed to all three arbitrators, stating that

"United Nuclear Corporation has not participated in the arbitration except in efforts, undertaken under protest, to procure its dismissal and it will not participate in the arbitration or hearings or proceedings therein. . . ." Five reasons were set out:

1. A valid final judgment of the District Court of Santa Fe County, New Mexico, dated December 27, 1977, has determined that GAC has no right to arbitrate with UNC. This judgment was affirmed on appeal by the New Mexico Supreme Court, and certiorari was denied by the United States Supreme Court. *United Nuclear Corporation* v. *General Atomic Co.* 93 N.M. 105, 597 P.2d 290, *cert. denied,* 444 U.S. 911, 100 S.Ct. 222 (1979).
2. A valid final judgment of the District Court of Santa Fe County, New Mexico, dated April 4, 1978, has determined that the 1973 Uranium Supply Agreement — the contract under which arbitration is sought — is "null, void, unenforceable and of no effect whatever."
3. No arbitrable controversies exist between UNC and GAC since all of their claims respecting the 1973 Uranium Supply Agreement have been merged into and set at rest by the aforesaid judgments.
4. No court has ever determined that any dispute between UNC and GAC is arbitrable or ordered UNC to arbitrate such dispute with GAC.
5. For the reasons stated in the attached June 5, 1980 letter to Mr. John Scrivner of the American Arbitration Association, the so-called neutral arbitrator is not qualified to proceed further.

The last of these points was taken up and acted on first. Only a summary is appropriate here. The June 5 letter referred to is attached to this Final Award as Attachment A-1. At the opening of the June 16 hearings, the Panel Chairman made a statement which is set out as Attachment A-2. Under the AAA Commercial Arbitration rules, in a situation of this

kind the AAA is to determine whether the Arbitrator should be disqualified and inform the parties of its decision, which is conclusive. AAA Regional Representative in San Diego, John Scrivner, communicated the details of this situation to the central AAA offices. At the opening of the June 17 hearing, Mr. Scrivner reported that the disqualification charge had been overruled. This was confirmed by wire of that date to UNC. See Attachment A-3.

The Panel then turned to a consideration of the other stated grounds for UNC's withdrawal. Section 30 of the current AAA rules covering "Arbitration in the Absence of a Party" provides, as does a comparable provision in the rules in effect in 1973, as follows:

> Unless the law provides to the contrary, the arbitration *may* [underscoring added] proceed in the absence of any party which, after due notice, fails to be present or fails to obtain an adjournment. An award shall not be made solely on the default of a party. The Arbitrator shall require the party who is present to submit such evidence as the Arbitrator may require for the making of an award."

So far as the first provision of Section 30 is concerned, no common law or statutory constraint on proceeding with an arbitration when one party has withdrawn has been found. UNC has not identified any such constraint. Inquiry made of AAA's General Counsel reveals none. The Panel's independent inquiry, though not exhaustive, confirms this.

In exercising the discretion given it under Section 30, the Panel took account of the fact that the first three reasons for non-participation stated by Mr. Stephenson in his June 13 letter had been squarely rejected by the Panel in its Partial Award of November 14, 1979. The only remaining stated reason — that "No court has ever determined that any dispute between UNC and GAC is arbitrable or ordered UNC to arbitrate such with GAC" — can have no meaning apart from the first three assertions, for virtually all arbitration proceeds without prior judicial orders.

It was accordingly determined that the arbitration should proceed under the rule established by Section 30. To follow any other course would obviously sanction a facile means of frustrating the arbitration process.

The Panel then considered, in consultation with AAA regional representative Scrivner, whether the resignation of Arbitrator Levi presented a question separate and apart from the withdrawal of UNC. It was concluded that it did not.

This conclusion was reached with recognition of and respect for the fact that Arbitrator Levi's resignation might or might not be identified with UNC's withdrawal from the proceeding. The virtually simultaneous receipt by the AAA regional office of advice of the two actions on June 13th was taken into account. Arbitrator Levi's telephone call had included no accompanying explanation. A confirmatory letter to Mr. Scrivner, dated June 13 and received on June 17, read in full:

> "I resign effective at once as Arbitrator in the matter of *General Atomic Company* v. *United Nuclear Corporation* — 73-10-0078-77."

Section 20 of the AAA Rules, paralleling a rule previously in effect, provides:

> If any Arbitrator should resign, die, withdraw, refuse, be disqualified or be unable to perform the duties of the office, the AAA may, on proof satisfactory to it, declare the office vacant. Vacancies shall be filled in accordance with the applicable provisions of these Rules and the matter shall be reheard unless the parties shall agree otherwise.

Section 14 of the AAA rules (continuing a previous provision) authorizes the AAA to appoint arbitrators where "the parties" fail to do so under the terms of their agreement.

Both Section 20 and Section 14 appear to apply primarily to "neutral arbitrator" situations rather than to "party appointed arbitrators" as these terms are used in the AAA

Rules. They could not, as a practical matter, be applied to a situation in which an arbitration agreement provides for each party's appointment of one of three arbitrators, one of the party-appointed arbitrators resigns, and the party appointing him has terminated its participation in the proceedings.

It was accordingly determined on June 17 to adjourn the hearing until June 23, with formal notice to UNC of this schedule so that there would be opportunity for it to take whatever course it chose concerning its participation in the hearings and its appointment of an arbitrator to replace Mr. Levi. Nothing further was heard from UNC. The hearings were reconvened on June 23, and continued to completion on July 2. On July 2, several hours after the close of the hearings, the AAA Regional office received a further communication from Mr. Levi, confirming his telephone conversation of June 30 with Mr. Scrivner, which Mr. Scrivner had reported informally to the Panel members. Mr. Levi has asked that this letter be placed in the record of these proceedings and the record was reopened for that purpose. (See Attachment A-4)

On June 17 and again at the opening of the Panel hearings on June 23, it was made plain that UNC's nonparticipation in the hearings would not be considered in any way a basis for a default determination by the Panel. Note was taken of UNC's arrangements for daily receipt of the transcript and an electronic tape of each day's Panel hearing. No off-the-record discussions were thereafter held between either member of the Panel and GAC representatives.

The chairman directed attention to UNC's previous representations to the Panel regarding the position it would take with respect to the substantive issues in this case as summarized in UNC's Memorandum of Position, submitted in response to a Panel request:

> UNC will raise all issues determined to be arbitrable that it raised in the Santa Fe case between it and GAC. A short statement of the claim is that UNC has no obligation to deliver uranium to GAC and that the 1973 Supply

> Agreement is void as a result of fraud, economic coercion, breach of fiduciary duties in violation of the New Mexico antitrust statutes, §§49-1-1, *et seq.*, N.M.S.A. 1953 and that performance thereunder is not required because of commercial impracticability.

UNC supplied the Panel at that time with documents from the New Mexico court proceedings that it identified as sufficient to "give the Panel an insight into the issues on the merits," noting, however, that it would expect to expand on this presentation "in the light of further developments and additional information gained."

At a subsequent point in the earlier proceedings UNC stated that it must "respectfully decline the Panel's request to formally and definitively state, discuss or try its defenses to GAC's claims at this stage of the proceeding," but added:

> However, since the issues raised by GAC's 1973 Agreement claims here are identical with those adjudged in Case No. 50827 (the New Mexico proceeding) we can state that, if this arbitration should ever proceed as to all such issues, UNC's offensive and defensive claims will be the same as those raised by UNC's First Amended Complaint and reply to GAC's counterclaims in Case No. 50827, by the applicable provisions of the district court's pretrial order in Case No. 50827, and by UNC's Answer Brief in New Mexico Supreme Court No's 11988 and 12052 (consolidated), with one notable addition. As indicated in UNC's Answer Brief (see, for example, pp. 56, 63 and 68), GAC's violations of the New Mexico Antitrust Act are also violations of the Sherman Act (15 U.S.C. §§1 *et seq.*). Such an additional defense will be asserted by UNC if it should ever become necessary to do so.

UNC submitted to the Panel the four documents referred to. They cover in detail UNC's position and evidence on all points except the one noted. The record before the Panel includes at other points statements from UNC about that exception.

The Panel has considered these various UNC documents and statements in its determination of this case. There was no decision in the New Mexico courts on the merits of these issues; the New Mexico District Court entered a default judgment because GAC had not produced Canadian documents relating to the international uranium cartel. The Panel's Partial Award is a determination that the New Mexico court's action is not a bar to these arbitration proceedings.

II

We turn now to a consideration of the merits of the issues in controversy.

As has been stated, this dispute between United Nuclear Corporation and General Atomic Company had its origin in five long term contracts entered into by UNC with electrical utility companies during the period 1966-1971. Those contracts obligated UNC, which was engaged in mining and milling uranium along with other activities, to sell to the following utilities the indicated quantities of milled uranium (U_3O_8), also called "yellow cake."

Date of Contract	Utility	Quantity
1966	Commonwealth Edison (Dresden)	1,021,000
1967	Illinois & Michigan (Cook I & II)	6,118,000
1969	Detroit Edison	3,818,000
1970	Duke Power Co.	12,100,000
1971	Commonwealth Edison (LaSalle)	6,356,000

Prior to 1970, subsidiaries of Gulf Oil Company were engaged in research and development of a process of producing plutonium from the residual product of nuclear fuel after it is removed from the reactor. (Further development of what was referred to as "mixed oxide fuel" was subsequently suspended, apparently by Presidential order.) Prior to 1970,

Gulf subsidiaries were also engaged in the development of a high temperature gas reactor (HTGR) and were becoming involved in what is known as the "light water reactor" fuel business, the business in which UNC had been engaged.

During the summer of 1970 discussions commenced between Gulf Environmental and Energy Systems (GEES), a Gulf subsidiary, and UNC about the possibility of combining their activities. These negotiations continued, and culminated on July 1, 1971 in the formation of a new corporation, Gulf United Nuclear Fuel Corporation (GUNF), 57% of whose shares were owned by Gulf, and 43% by UNC.

UNC put into the new corporation the five utility agreements and the uranium committed by those agreements as well as its technology, patents, and a contract to supply fuel to the United States Navy. It retained its mining properties and its mining and milling facilities. Gulf put in the facilities of Gulf General Atomic, including a grid manufacturing facility. It also put in a contract which it had to supply 3,200,000 pounds of uranium to a Florida electrical utility, and $8,700,000 in cash. There were commitments for a total of $31,500,000 future loans to GUNF by both parent corporations of which $2,300,000 had been made solely by Gulf, and $5,250,000 by both parent corporations in proportion to their stock ownership before UNC sold its interest in GUNF to Gulf in 1973. GUNF agreed to pay UNC $1,200,000 annually for royalties and $400,000 annually in rent.

In 1972 and early 1973 it became clear to Gulf and UNC that additional financing, far beyond the initial estimates, would be necessary for GUNF. Several circumstances had contributed to this result: delays in nuclear utility plant construction and operation; additional competition; increased costs of production and the cancellation, a few months after GUNF was formed, of the U.S. Navy contract which had been expected to produce an annual profit of $500,000-$600,000.

Both UNC and Gulf attempted unsucessfully to interest third parties in GUNF. The parent corporations then turned to the possibility of one of them buying out the other. On November 1, 1972, Gulf offered to turn over to UNC its entire interest in GUNF for one dollar and "an indemnity from United Nuclear for any liabilities Gulf may have under the various fuel contracts with the five utilities." UNC did not accept that proposal. Negotiations continued, and on August 2 and 3, 1973 Gulf and UNC executives met and exchanged proposals and counter-proposals for the solution of GUNF's problems.

Gulf accepted a UNC proposal which contemplated that Gulf would repay, with interest, the loans which UNC had made to GUNF (approximately $1,892,000) and would buy at their book value ($1,308,000), UNC's shares in GUNF. UNC was having problems with its mining schedules because of the delay in the construction and operation of the utility reactors. It was agreed that UNC would continue until the end of 1978 to assume the risk of utility delay, or "slippage" as it was called, and that thereafter Gulf would assume that risk and all further uranium would be delivered on a fixed schedule then established. The net result was that UNC continued to bear the risk of slippage on approximately 8,000,000-9,000,000 pounds of uranium, and as to the balance of about 15,000,000 pounds Gulf would bear the risk of further slippage and would accept from UNC the uranium called for by the utility contracts on a fixed schedule. The fixed schedule uranium was to be delivered and paid for regardless of utility slippages or contract cancellations, and GUNF was free to dispose of it as it saw fit.

After negotiation, Gulf agreed to a price increase upon the uranium UNC was obligated to furnish: 50 cents per pound on the first 10,000,000 pounds, and 25 cents per pound on the balance, which when all uranium called for by UNC's contracts had been delivered, would amount to $8,700,000.

The agreement also provided for a mutual release of all claims by each of the parties against the other.

After the agreement between UNC and Gulf had been executed and Gulf had bought all of GUNF's stock, General Atomic Company, a partnership owned by Gulf and Scallop Nuclear, a subsidiary of Royal Dutch Shell, was created. Effective January 1, 1974, all of GUNF's rights and obligations under the utility agreements and the 1973 Supply Agreement were assigned to General Atomic Company.

* * *

The price of uranium increased sharply in 1973 and 1974. The 1973 OPEC oil embargo dramatically demonstrated the need for development of alternative sources of energy. Approximately 25% of the total oil consumption in this country is utilized in the production of electricity. Electrical utilities ordered 64 new nuclear reactors in 1973 and 1974. Each of those new reactors would eventually require the production of 13 to 14 million pounds of uranium. There also was a change in the pattern of government contracts for the enrichment of uranium, an essential step in the production of nuclear fuel, which is a governmental monopoly. The government adopted a policy of requiring nuclear utilities to enter into long term commitment contracts for enrichment services. The utilities were thus required to supply the government with fixed schedules for enrichment, and in 1974 the government stopped accepting new contracts for the enrichment of uranium.

Other factors were also operating to increase the demand for uranium. In the fall of 1973 Tennessee Valley Authority requested all of the uranium producers to bid on a block of 86 million pounds of uranium. This request, which apparently was not satisfied, created comment in the trade press as to the adequacy of production facilities in order to meet future demands. Furthermore, during 1973 and 1974 the government policy with respect to the use of recycled material — plutonium and uranium — was changed. The industry had previously anticipated that about 25% of the total demand for fissionable materials to be used in the future would be supplied by recycled material. This prospect was eliminated by

the action of the government, which prohibited the use of recycled fuel.

During 1973-74 the United States had placed an embargo upon the importation of foreign uranium. That embargo continued through 1976 and only began to be relaxed in stages in 1977. After the 1973 oil embargo the French announced that they would no longer sell uranium to other nations and thus the uranium producing areas under French control were removed as a source of supply. Australia also announced a moratorium upon supplying uranium outside of Australia and Canada announced a new export policy requiring assurance of an adequate domestic supply before uranium could be exported. Inflation also played a part in the increase in the price of uranium. Moreover, the cost of producing uranium was increasing during 1973 and 1974 both because it was becoming profitable to mine lower grade ore, and because more stringent federal regulations concerning the safety of mining operations increased the cost.

* * *

The evidence before the Panel establishes UNC's five contracts with the utilities, the 1971 and 1973 supply agreements between UNC and Gulf and the assignment of the 1973 supply agreement to GAC and UNC's nonperformance. This leads to consideration of the various claims UNC advances as justification for its nonperformance. As has been stated, copies of the documents asserting those claims had previously been furnished to the Panel, and summaries of those claims had been put before the Panel by UNC's attorneys in earlier hearings.

UNC contends that it has no obligation to GAC under the 1973 Supply Agreement. This contention appears to be based upon the language of the assignment clause of that agreement, which states that the agreement inures to the benefit of "the legal representatives and successors" of the immediate parties. Such an interpretation would largely deprive the clause of all meaning because unless the word

"successors" includes "assignees", the clause has no significance. The interpretation of the agreement by UNC before litigation was commenced shows that it intended and understood that GAC had succeeded to the rights of Gulf under the 1973 Supply Agreement. That interpretation was demonstrated by UNC's performance as well as by its statements to the Securities Exchange Commission and to its own shareholders and we agree with it.

UNC has also disputed its obligation to deliver uranium on the ground that delivery was not required because a "Limitation of Liability" provision contained in four of its utility contracts permitted UNC to terminate performance and be liable only for the price the utility was to pay for the uranium. But the testimony of the UNC executives who negotiated those contracts, as well as the testimony of a principal executive of one of the utilities, establishes that the limitation of liability clauses were intended to relate only to potential liability under certain guarantees contained in the contracts. They were not intended to apply to an intentional failure to perform.

UNC's principal contention is that it was absolved from any obligation to GAC under the 1973 Supply Agreement by a series of actions by Gulf involving the establishment of GUNF, its administration as a joint enterprise, the purchase of UNC's interest and the negotiation of the 1973 Supply Agreement. These actions are alleged to have constituted fraud, breach of Gulf's fiduciary relationship to UNC as a participant in the joint enterprise, and economic coercion. They created a situation, UNC maintains, in which its performance of the supply agreement became commercially impracticable and impossible.

The evidence does not support these claims. It reflects, to the contrary, the negotiation of an agreement between experienced, competent and informed corporate representatives, full participation by both parties in the joint enterprise according to the terms of the agreement, and an arms-length dissolution of that enterprise when it proved unsucessful.

There is no evidence of UNC's being coerced into action it considered unacceptable at the time it was taken or of its inability at any point to perform its commitments. The evidence is rather that when, after two years of performance under the 1973 agreement, the price of uranium rose sharply, UNC decided to break its commitment so that it could sell its uranium at higher price to other purchasers.

Taking up the UNC contentions in more detail, there is first its claim that during 1970-73 Gulf had misrepresented the extent of its interest in and commitment to the light water fuel reactor business in order to harm or destroy UNC, which had been engaged in that business. The testimony before the Panel establishes however, that Gulf was committed to the light water fuel business both as to initial fabrication and as to the reprocessing of nuclear fuel which has already been mentioned. To that end, it had made significant investments. While Gulf was also interested in the high temperature gas reactor HTGR method, it intended to proceed actively with the development of the nuclear fuel business by both methods. UNC's claim to the contrary can not be sustained.

During the discussions that preceded the formation of GUNF, there had been concern about how the new corporation would obtain the uranium which it needed. The problem was a sensitive one, since both UNC and Gulf were producers of uranium and an agreement between them would obviously be subject to strict scrutiny and perhaps to attack under the antitrust laws. The solution ultimately adopted was that the Gulf subsidiary, Gulf Energy and Environmental Systems, (GEES), would negotiate with GUNF for the sale and purchase of uranium. If those two companies reached an agreement with respect to a supply of uranium, UNC would then have an option to supply 40% of that amount under the terms that had been agreed upon. After GUNF was formed, a potential agreement between GEES and GUNF involving the sale of seven million pounds of uranium to GUNF fell through because GUNF was unwilling to buy except on a requirements schedule, while GEES, which would have had to

purchase in the open market, on a fixed schedule, was unwilling to sell except on a fixed schedule. Subsequently, in the spring of 1972, an agreement was reached for the sale by GEES and purchase by GUNF of 5,200,000 pounds of uranium. The contention that Gulf deliberately refused to supply GUNF with essential uranium is not sustained by the record.

Another pre-incorporation claim asserted by UNC relates to the handling of GUNF's losses for federal tax purposes. A provision in the Internal Revenue Code limited the length of time during which a loss could be carried forward. It was anticipated that GUNF would lose money for a considerable period, which would or might extend beyond the permissible limitation. In order to take advantage of GUNF's financial losses for federal tax purposes, it was agreed that the operations of GUNF would be included in Gulf's consolidated tax returns. This method contemplated that there would be no taxes billed to GUNF as long as Gulf could utilize the tax losses in reducing its own income taxes and that when GUNF ultimately became profitable, its income taxes would be paid by Gulf until all of the tax benefit that had accrued to Gulf as a result of GUNF's losses had been restored. Gulf never took advantage of this provision because it had foreign tax credits during the period in question, and the matter became academic because GUNF never showed a profit.

UNC also claims that it was placed in an impossible financial position by Gulf's breach of its fiduciary duties. UNC had been in the business of light water reactors for a much longer period of time than Gulf, and UNC was the primary source of information as to the amount of necessary capitalization. During the pre-incorporation discussions it was represented by UNC and assumed by Gulf that the "negative cash flow" of GUNF would probably not exceed 35 million dollars. Earlier prognostications made by UNC, which were not disclosed to Gulf's representatives during the negotiations, had indicated a much greater need for cash — in the total amount of 70 million dollars or more.

UNC also charges that Gulf had failed to perform its commitments to furnish financing to GUNF. A rather elaborate pattern of loan agreements, some mandatory and some voluntary, had been negotiated and was set out in the incorporation agreement. There was no obligation upon either parent corporation to supply unlimited funds to GUNF. The distinction between mandatory and discretionary loans is plain upon the face of the agreement, and the record shows that to the extent that Gulf was required to make loans it performed it obligation.

Moreover, the contention of financial impossibility is rebutted by evidence that establishes UNC's ability to finance other major expenditures during the period that it was refusing to make voluntary loans to GUNF in proportion to its stock ownership. A consolidation of naval fuel facilities cost about $10,000,000. The acquisition of the remaining 50% interest in Douglas United cost more than $500,000. In October of 1971 UNC acquired the Plateau Coal Mining Company for $10,000,000, and in addition spent more than $1,000,000 for new equipment. Shortly before April 1, 1974, UNC had acquired an enterprise called TSI for $1,400,000. This enterprise was shut down in 1974. And finally, prior to the 1973 Supply Agreement, UNC had owned more than 50% of Uranium Recovery Corporation, and shortly after that agreement it bought the remaining portion for approximately $5,300,000. UNC's contention that it was somehow put in an impossible financial position because Gulf had violated its fiduciary obligations is not supported by the evidence.

The agreement provides that Gulf would have an option to sell to GUNF 50% of the uranium required after January 2, 1974 for use in reload fuel assemblies to be fabricated thereafter pursuant to UNC's five electrical utility contracts. UNC had a similar option with respect to Gulf's obligation to furnish uranium to the Florida Power Company. The possibility of a fixed obligation on the part of Gulf to furnish 50% of the uranium to meet UNC's commitments had been discussed, but had been discarded for antitrust reasons. No

such undertaking by Gulf was included in the integrated agreement.

UNC also contends that Gulf entered into the formation of GUNF in order to obtain confidential information from UNC for use by Gulf in pricing HTGR fabrication with the intent of eliminating UNC as a competitor and of gaining control of UNC's business and properties. The testimony before the Panel shows, however, that information about light water fuel pricing was a matter of public knowledge, and in any event, would be of no particular value in pricing HTGR fabricated fuel because the techniques and processes in the two types of fabrication are entirely different.

UNC also asserts that Gulf did not intend to manage GUNF in full cooperation with UNC, and did not do so. Concerning this claim, the record shows that a large majority of the employees of GUNF were former UNC employees. The president of GUNF was a former Gulf employee, but the executive vice president and three of the other four vice presidents were former UNC employees. These officers had been agreed upon and jointly named in the preincorporation agreement by Gulf and UNC. Mr. David F. Shaw, president of UNC, testified that UNC had more controls, as a minority partner, than are often found in such arrangements, and that the final result of negotiations between Gulf and UNC, as embodied in the agreement, were acceptable to him. During GUNF's existence, pricing policy was worked out by agreement between the two corporations and UNC had an effective veto power over major corporate decisions.

At an earlier stage in these proceedings UNC counsel exhibited to the Panel a memorandum, prepared by an employee of GEES, apparently to create the impression that Gulf had forced certain unfavorable accounting methods on UNC. The testimony and records show however, that this memorandum was in fact rejected by the Gulf officials to whom it was submitted and that no accounting practices whatsoever were forced upon UNC by Gulf. The memorandum in question is entitled to no more weight than is the

evidence that UNC minimized the losses it incurred during the GUNF period by accounting practices that were technically legal but did not accord with customary accounting practices.

The Antitrust Claim

It appears that UNC has never, in any of its litigation, directly charged Gulf or GAC with violation of the federal antitrust laws. UNC did state before the Panel that if it ever became necessary, such a claim would be asserted, but the claim was never actually put forward. At one stage in the earlier precedings before this Panel, it appeared that such a claim was being made, but after discussion with counsel for both parties, the Panel ruled that the apparent assertion had been inadvertent, and that no federal antitrust claim was before the Panel.

This seemingly unimportant procedural technicality became significant in this case for two reasons: (1) On December 8, 1978 the United States Court of Appeals for the Seventh Circuit held that the attorneys who represent United Nuclear before this Panel, the firm of Bigbee, Stephenson, Carpenter & Crout, were disqualified, because of a conflict of interest from representing UNC in a federal antitrust proceeding against Gulf. (*Westinghouse Electric Corporation* v. *Gulf Oil Corporation, et al.*, 388 F.2d 221.) (2.) UNC repeatedly asserted that the Panel lacked jurisdiction over antitrust claims and that such claims were so intermingled with UNC's assertions of fraud, deceit and violation of fiduciary obligations, that the Panel was without jurisdiction to determine any of the issues in this matter.

Of course the allegation of the existence of an antitrust claim, state or federal, cannot of itself be effective to bar an arbitration. Such a result would render contractual arbitration clauses meaningless, and would frustrate state and federal arbitration statutes. This challenge to jurisdiction, like most others, depends upon the existence of facts. A determination of the existence of those facts is essential to a determination of the legal issue of jurisdiction. If the facts relied upon to

show lack of jurisdiction, in this case the existence of conduct which violates the antitrust statutes, do not exist, the attack upon jurisdiction must be denied. We turn, therefore, to an examination of the facts relied upon to sustain the claims of antitrust violations.

In this proceeding UNC asserts that Gulf and GAC engaged in predatory efforts to control New Mexico uranium and also UNC's uranium. It is asserted that Gulf signed a number of contracts in an effort to tie up huge quantities of uranium during the period when the price was low, and to keep uranium out of competition with the foreign cartel of which Gulf was a member. GUNF needed to purchase uranium for its fabrication work and also for its HTGR reactors. But the record before the Panel makes it entirely clear that Gulf, acting through its subsidiary, Gulf Energy and Environmental Services (GEES) and through GUNF as well as GAC, consistently maintained, until June of 1975, a balance between supply and demand that was as close as possible. In June of 1975, utilities began to cancel their contracts to purchase HTGR reactors and the associated uranium from GAC. The balance was then disrupted because GAC was left with the uranium which it was obligated to buy and had intended to deliver with the HTGR reactors.

In addition to the testimony of officers of GAC and its predecessor Gulf-related subsidiaries, a tabulation of offers to supply uranium to those Gulf subsidiaries and to GAC was received in evidence. It shows that during the period from January, 1966 through March of 1975, those companies rejected 58 offers to sell an aggregate total of 288.4 million pounds of uranium. Of course these rejected offers did not relate solely to New Mexico uranium. But uranium is fungible, and an effort to control the supply of uranium within a single state would be economically meaningless.

Another aspect of the antitrust claim asserted by UNC relates to the acquisition by Gulf of uranium deposits in what is known as the Mt. Taylor properties and its allegedly deliberate delay in developing those properties in order to in-

crease the price of uranium. The uranium deposits in the Mt. Taylor properties were apparently of a higher than average grade of ore, but they also lay at a substantially deeper level than other uranium mines. No uranium had theretofore been mined from so great a depth. The area also contained numerous underground rivers which seriously complicated the mining process. Studies conducted by outside engineers indicated the necessity for substantial expenditures and additional studies before the commercial feasibility of the project could be determined with any degree of certainty. The numerous studies of the engineering situation affords convincing evidence that the project was an extremely difficult one from a physical point of view and an uncertain one from a financial point of view. An internal request for an authorization for the expenditure of corporate funds in connection with the development of Mt. Taylor property dated September 13, 1972 stated:

> "The Mt. Taylor mining project is designed to bring Gulf's east Ambrosia uranium deposits into major production by 1980. These orebodies lie at depths of 3200 to 4200 feet, which is more than twice the depth of any previous sandstone uranium mining. High water flows and high rock temperatures will contribute to make Mt. Taylor an extremely difficult mining situation.
>
> "Before committing to deliver significant amounts of uranium from this deposit we must confirm ore reserves and mining costs by underground development and test mining. This requires an investment on the order of $20,000,000 without having a good fix on the ultimate economics. This pilot investment is of necessity a complete mining plant capable of sustaining development operations in limited production to a toll mill."

The facts do not sustain the claim that Gulf deliberately delayed development of the Mt. Taylor property.

UNC also charges Gulf with violation of its fudiciary duty because it did not disclose its participation in the uranium

cartel to UNC during the period from 1972 until September of 1973, while both companies were owners of GUNF. Testimony of officials of UNC establishes, however, that they knew of the cartel, and of the participation of Gulf by the spring of 1972. The 1971 Supply Agreement preceded the first meeting of representatives of the cartel nations. And after UNC knew of the cartel and of Gulf's participation in it, UNC continued to meet its obligations under the 1973 agreement through 1974 and the first half of 1975.

The government of Canada initiated the uranium pricing agreement with the governments of Australia, South Africa and France as a response to actions of the government of the United States which had closed the uranium market in this country to foreign uranium. The pricing agreement provided that it was not to operate in any of the four participating nations, or in the United States. During the existence of the cartel from the date its first price was fixed, August 17, 1972, through 1974 when its last price was fixed in March of that year, the price of uranium in the United States was consistently higher than the cartel prices, with the exception of two months during that period.

It is unlikely that the cartel had any economic effect upon the price of uranium in this country. In its February 20, 1976, letter to its shareholders UNC stated:

> "Published spot prices of uranium have risen from $6 per pound of U3 08 in early 1973 to $35 per pound in early 1976. We believe that uranium prices now reflect for the first time in the history of the industry a market price determined by a combination of market factors, including costs to replace current reserves, production costs recognizing mining and milling safety and environmental regulations and requirements, and supply and demand factors."

And again, in a May 10, 1977 letter to its shareholders, UNC stated:

> "There has been much discussion regarding the sharp rise in uranium prices since late 1973. Some contend that pre-

sent prices are unreasonably high and cannot be sustained. On the contrary, we believe prices reflect uranium supply-demand realities, and production and replacement cost considerations. Today's uranium prices are very comparable to the $8.00 per pound that prevailed in the 1950's, adjusted for cost, inflation, lower average ore grades, and the increased cost and lost productivity in complying with government regulations."

UNC's Annual Report for its fiscal year 1973 stated that it had sold no uranium during that fiscal year because it felt that the price was too low, and that it was to UNC's advantage to retain its uranium rather than to dispose of it at the then prevailing prices. If the cartel had any effect whatsoever on uranium prices in this country, it was not adverse to UNC, a producer and not a consumer of uranium.

We have already determined that none of UNC's assertions of fraud, breach of fiduciary relationship, or economic coercion is well founded in fact. Those claims are also relied upon by UNC to establish antitrust violations, but their factual basis is no stronger in the antitrust context.

GAC has argued and has presented authorities which indicate that the cartel aspect of UNC's antitrust claim is precluded by the Act of State doctrine and also by the federal constitutional provisions which reserve the conduct of foreign affairs to the federal government. We do not find it necessary to discuss these contentions, or to consider other aspects of federal preemption of state antitrust claims that have been argued by GAC, because the facts do not establish a colorable basis for those claims.

RELEASE

In its rebuttal case, GAC offered evidence concerning identical mutual releases contained in the 1973 Supply Agreement. The terms of the release clause were the subject of particular attention by Gulf's attorneys because during the negotiations that preceded the agreement, one of UNC's representatives referred to a possible claim of breach of con-

fidential relationship on the part of Gulf, and also because a Gulf attorney had been told by a UNC attorney that UNC had been preparing an action against Gulf. As to Gulf and GUNF the release provided:

> "7. As of the Closing Date, UNC shall release and discharge Gulf and the Corporation from all claims, causes of action, debts, obligations, liabilities and duties (except those arising hereunder, those arising under the instruments executed pursuant hereto and those arising under the instruments described in Exhibit C attached hereto) which are owed to UNC by Gulf and/or the Corporation on the Closing Date and in any way arise out of the organization of the Corporation, the business or activities conducted by the Corporation, the management of the Corporation, the Preincorporation Agreement or any instrument executed pursuant to, or in connection with, the Preincorporation Agreement."

This release was the result of negotiations between the executives of the three corporations and their attorneys. We see no reason why it should not be given effect according to its terms.

Commercial Impracticability

As a justification for its breach of the terms of its underlying contracts with the utilities and the 1973 supply agreement, UNC asserts the defense of commercial impracticability. It points to the substantial delays that occurred in the construction and operation of nuclear reactors for which uranium concentrates were to be furnished. It also emphasizes the increases in UNC's costs of production, and it asserts that both of these problems were caused in major part by the acts and omissions of governments and through no fault or neglect of UNC. General inflation is also relied upon.

Under the doctrine of commercial impracticability as expressed in the Uniform Commercial Code, non-delivery is not a breach if performance has been made impracticable by the occurrence of a contingency, the non-occurrence of which was

a basic assumption upon which the contract was made, or by compliance in good faith with any applicable foreign or domestic governmental regulation or order. In such a case the seller is required to notify the buyer seasonably that there will be a delay or non-delivery, and he must allocate his available supply among his customers. The circumstances which have made performance impracticable must have been unforeseen and not within the contemplation of the parties at the time of contracting.

Increased cost alone does not excuse performance in the absence of an unforeseen contingency which alters the essential nature of the performance. Neither a rise nor a collapse of the market is in itself a justification, for that is exactly the type of business risk which business contracts made at fixed prices are intended to cover. Lack of foreseeability is the key factor in the application of the doctrine. If a future condition is foreseeable or foreseen, it is the responsibility of the contracting parties to guard against it. The party who invokes the doctrine cannot himself have been responsible for the condition of which he complains.

When these principles are applied to the present dispute, it is apparent that the essential conditions for application of the doctrine of commercial impracticability do not exist. To the extent that inflation resulted in increased costs of production, the contracts with the utilities (except the Dresden contract with Commonwealth Edison) contained escalation clauses that were the result of arms length negotiations between UNC and each utility. Commonwealth Edison had flatly refused to agree to any escalation clause, and none was incorporated in that contract. In the case of the other contracts, the escalation provisions were the result of negotiations between UNC and each utility, and as Mr. David F. Shaw, President of UNC stated, if the negotiated escalation provisions turned out to be inadequate, "[T]hat's the risk you take."

During the late 1960's revised federal mining legislation and new or revised administrative regulations increased the

cost of all mining operations. It also appears, however, that these changes were foreseeable and in fact had been foreseen generally throughout the mining industry. There had been substantial industry opposition to the new safety standards and UNC was aware of these developments.

Construction of a nuclear electrical power plant is a major undertaking in terms of time and money, and the testimony of principal operating officials of UNC shows that they had anticipated substantial delays. In the case of the contracts here involved, some instances of delay in reactor construction resulted in the payment of deferral charges by the utilities.

In the uranium industry mining costs increase as the price of the product increases. This phenomenon appears to be the result of internal management decisions that the higher price will make it profitable to extract a lower grade of ore. This occurred in the present case. Finally, UNC's statements to the public, to its shareholders and to regulatory agencies remove any doubt as to the adequacy of UNC's supply of uranium to meet its contractual commitments.

We conclude, therefore, that the claim of commercial impracticability is without merit.

Remedies

The remaining question, regarding appropriate remedies, is considered in the framework provided by the Uniform Commercial Code, as well as the Commercial Arbitration Rules of the American Arbitration Association, which provide:

> The Arbitrator may grant any remedy or relief which the Arbitrator deems just and equitable and within the scope of the agreement of the parties, including but not limited to, specific performance of a contract. . . .

The arbitration clause of the 1973 Supply Agreement leaves the Panel broad discretion so far as remedies are concerned.

The five underlying contracts originally entered into between UNC and the four utility companies called for separate deliveries of a total of approximately 29,500,000 pounds of uranium over a period extending from 1967 to 1986. These deliveries were to supply a number of different reactors, some of which were still under construction.

UNC's original contracts involved a variety of delivery commitments. Some were "fixed" commitments calling for the shipment and acceptance of specific amounts of uranium at specified prices on dates certain. Most were "requirements" commitments with deliveries to be made in accordance with the utilities' needs. All but one of the contracts contained provisions for production cost escalation, as measured by various national indices.

Four deliveries (totaling 1,552,000 pounds) had been made by UNC prior to the establishment of GUNF, and another two (totaling 1,259,000 pounds) were made in 1972 and early 1973. Two additional deliveries (totaling about 1,200,000 pounds) were made by UNC in 1974 and in the first half of 1975, after GAC had succeeded GUNF and prior to UNC's institution of litigation. UNC also made a small delivery directly to one of the utilities in late 1975 and another in 1978.

The remaining commitments under the 1973 Supply Agreement were, then, for the delivery of approximately 24,400,000 pounds of uranium at various times between 1975 and 1986. This is the uranium and these are the delivery commitments for which UNC denies contractual liability and which are included in GAC's claim for damages or other remedy in this arbitration proceeding.

The problems that had afflicted first UNC, and then GUNF, were largely caused by delays (slippages) in the construction and operation of reactors by the utilities. To lessen the impact of future slippages upon its mining operations, UNC had requested, during the negotiations that preceded the execution of the 1973 Supply Agreement, that a substantial

amount of uranium previously covered by requirements type contracts be converted into fixed supply contracts. This request was acceded to. All deliveries originally scheduled for the period up to December 31, 1978 were left, by Article IV of the Supply Agreement, on a requirements basis, and they were itemized in Exhibit B of the Supply Agreement. All deliveries originally scheduled for the period following January 1, 1979 on were to be treated, as between the parties to the 1973 agreement, on a fixed supply basis — to be delivered by UNC and accepted by GAC on the delivery dates originally specified in the contracts between UNC and the utilities regardless of when the utilities called for delivery. The fixed delivery commitments were itemized in Exhibit C of the Supply Agreement. Although Exhibit B does not total the requirements type commitments because of their contingent nature, those commitments covered 24 original deliveries involving what could be approximated as a total of 9,000,000 pounds of uranium. Exhibit C, covering fixed type commitments, itemized 39 delivery dates (on a year-by-year basis from 1979 through 1986) and amounts to a total of 16,167,000 pounds of uranium.

The deliveries made by UNC following the effective date of the 1973 Supply Agreement, totaling approximately 1,000,000 pounds, were against requirement type commitments. There have been no deliveries against fixed type commitments. Of the total, therefore, of some 24,000,000 pounds of uranium which UNC undertook but has failed to deliver or is under present commitment to deliver in the future, approximately one-third (about 8,000,000 pounds) comes under the requirements type commitment, and approximately two thirds (about 16,000,000 pounds) under the fixed type commitment.

* * *

In terms of appropriate remedy, UNC's continuing breaches fall into three categories. The first involves the situations that have arisen since August 1975 in which the delivery dates specified in UNC's contracts with the various utilities

have approached, the utilities have called for delivery, GAC has demanded delivery by UNC, but UNC has defaulted, and GAC has had to provide the uranium from other sources. Some 3,530,311 pounds of uranium have been involved in these instances.

GAC obtained most of this uranium in the spot market. The spot market prices have ranged, for the particular month in which deliveries were made by GAC to the utilities, between $35.00 and $43.25. The contract prices at which UNC was committed to supply this uranium to GAC (including base contract prices, escalation clause effect where applicable, and the 50¢-per-pound over-ride agreed to in the Supply Agreement) would have ranged from $7.30 to $12.06 per pound.

It should be noted that during the period in which it defaulted on its commitments to supply this 3,539,311 pounds of uranium at the prices fixed in its original contracts, UNC delivered approximately 9,000,000 pounds of uranium to other purchasers on contracts entered into after 1975, at prices averaging on an annual basis (from 1976 to 1979) from $31.95 to $41.13 per pound.

GAC claims damages for these delivery defaults by UNC in the amount of $132,741.806. This figure was arrived at by (i) computing the contract prices at the delivery dates including the original base price in the UNC/utility contracts, the 50-cent-per pound over-ride added by the 1973 Supply Agreement, and escalation; (ii) ascertaining the publicly reported spot market price for the various delivery dates; (iii) computing the difference between the contract and spot market prices; (iv) multiplying this by the number of pounds of uranium delivered. To the resulting amount of $112,852,043, interest at 10% from the mid-point of the delivery year to June 30, 1980, amounting to $19,889,763 was added, for a total of $132,741,806.

We have considered various alternative measures and have concluded that the use in this computation of generally

prevailing and reported spot market prices is appropriate. These prices are regularly quoted in a publication, Nuexco, which has wide trade acceptance. There is another monthly quotation of "average delivered prices," which includes prices received under long term contracts; its resulting average prices are therefore considerably lower than Nuexco's spot price averages. It is clear, however, that an "average delivered price" figure is not relevant to the determination of GAC's costs in obtaining from alternative sources the uranium UNC was committed, but failed, to supply. GAC had to go into the spot market to cover those commitments. The spot market prices quoted by Nuexco and used in GAC's computation of damages are also close to those which UNC received for selling to others the uranium it was committed by contract to deliver to these utility companies.

We have also considered whether the damages here should be computed, alternatively, on the basis of costs actually incurred by GAC in obtaining the uranium delivered to the utilities — rather than on the basis of the spot market index. But to the limited extent that GAC took this uranium out of its own inventory, it had to forego what would otherwise have been its opportunity to sell that uranium on the open market and at current prices. The Nuexco quotations of spot market prices have proved and have been accepted as reliable. Their use in the computation of damages here is appropriate.

The addition of interest to the amount of the damage is in accordance with recognized authority and practice. There is a question however, as to the computation of the interest. GAC describes the 10% figure as no more than a rough averaging of the prime interest rate for the period involved here. A more precise calculation of interest is appropriate and

we have recomputed the interest through June 30, 1980 and the total damages as shown in the following table:

1973 Supply Agreement
Missed Deliveries Supplied
To Utilities By GAC

Delivery Date	Damages	Interest to 6/30/80*	Total Damages
1/1976	10,911,885	3,437,244	14,349,129
1/1977	12,959,668	3,175,119	16,134,787
4/1978	13,576,733	2,443,812	16,020,545
5/1979	13,784,848	2,050,379	15,835,227
4/1980	10,465,780	431,713	10,897,493
1/1980	16,489,129	1,360,353	17,849,482
1/1978	16,100,000	2,146,581	18,246,581
6/1979	18,564,000	2,564,145	21,128,145
	112,852,043	17,609,346	130,461,389

* 7% for 1975, 1976 and 1977; 8% for 1978; 12-3/4% for 1979; and 16-1/2% for 1980. Based on average prime rate in each year.

The second category of commitments for which GAC claims money damages includes those with delivery dates prior to June 30, 1980, which have now passed with neither UNC nor GAC making deliveries. A total of 5,433,000 pounds falls within this category. Using the same computational formula that was applied to the missed deliveries by UNC which were in fact delivered by GAC to the utilities, GAC arrives at a damages figure of $149,766,825, to which it has added 10% interest, ($21,690,496) for a total damages figure of $171,457,321. Again we have recomputed the interest at

averages of the prime rate for each year, with the result shown in the following table:

1973 Supply Agreement
Damages and Interest
Missed Deliveries Not Supplied To Utilities

	Damages	Interest To to 6/30/80*	Total Damages
1975	5,170,550	1,809,693	6,980,243
1976	10,837,750	3,034,570	13,872,320
1977	11,534,600	2,422,266	13,956,866
1978	11,492,250	1,838,760	13,331,010
1979	2,360,820	301,005	2,661,825
	16,224,200	2,068,586	18,292,786
	14,659,860	1,869,132	16,528,992
	13,404,100	1,709,023	15,113,123
	14,803,600	1,877,459	16,681,059
	8,337,000	1,062,968	9,399,968
	13,450,400	1,714,926	15,165,326
1980	6,270,125	258,643	6,528,768
	4,288,460	176,899	4,465,359
	4,788,410	197,522	4,985,932
	2,797,500	115,397	2,912,897
	9,347,200	385,572	9,732,772
	148,766,825	20,842,421	170,609,246

* 7% for 1975, 1976 and 1977; 8% for 1978; 12-3/4% for 1979; and 16-1/2% for 1980. Based on average prime rate in each year.

The third category involves UNC's commitments to make deliveries on future dates that have not yet arrived. Money damages based on market price at the time of delivery cannot be computed with respect to these deliveries.

Uranium is not unique, but the legal doctrines that formerly restricted the remedy of specific performance to cases involving land or unique chattels are no longer controlling. Both the Uniform Commercial Code and the rules of the American Arbitration Association authorize the use of specific performance in situations which do not involve unique chattels. Specific performance is the obviously appropriate remedy with respect to this third category of deliveries.

The total quantity of uranium involved in this category is 15,028,007 pounds. Of this total amount 2,754,007 pounds are included in requirement type (Exhibit B) commitments under the 1973 Supply Agreement which originally called for deliveries prior to January 1, 1979 but with respect to which there have been slippages due to changes in utility construction or production schedules. Our determination and award is that UNC make delivery of these amounts to GAC at Supply Agreement prices when and as such deliveries are called for by the utilities and by GAC.

The remaining comitments call for the delivery of 12,274,000 pounds. They are fixed type (Exhibit C) commitments under the 1973 Supply Agreement. Our determination and award with respect to these commitments is that UNC make deliveries to GAC upon the delivery dates, in the amounts and upon the terms specified in the Supply Agreement.

The damages and the specific performance which we award are summarized as follows:

AWARD

Monetary Damages

	Damages
Missed Deliveries:	
Which Have Been Delivered To Utilities	$130,461,389
Which Have Not Been Delivered To Utilities	170,690,246
TOTAL DOLLAR DAMAGES ON MISSED DELIVERIES	$301,181,635

Specific Performance

Delivery of Uranium Substantially on the Following Schedule:

Year	Requirement Type Exhibit B (lbs)	Fixed Type Exhibit C (lbs)
1980	530,000	1,262,000
1981	799,007	2,692,000
1982		2,232,000
1983	1,015,000	1,772,000
1984	410,000	1,772,000
1985		1,772,000
1986		772,000
	2,754,007	12,274,000
TOTAL URANIUM DUE		15,028,007 (lbs.)

We note, finally, the "alternative remedy proposal" made by GAC at the end of the hearing before the Panel. This alternative proposal contemplates that all of UNC's delivery commitments except those which GAC has already covered (the 3,530,311 pounds in the first category) be included in a revised schedule extending into the year 1988. A proposed schedule is set out. It leaves the requirements and fixed supply deliveries for the period from mid-1980 through 1986 as they are in the 1973 Supply Agreement but it defers until

1985 to 1988 the delivery of the 5,443,000 pounds that were not supplied to the utilities during the period between 1975 and mid-1980.

This proposal will result in a substantial monetary advantage to UNC if the market price of uranium stays, as it is currently, below the peak levels of 1975 and 1979. The proposed revised schedule spreads deliveries out over the entire period on a relatively even basis. The alternative proposal is as follows:

ALTERNATIVE AWARD

Monetary Damages

	Damages
Missed Deliveries: Which Have Been Delivered to Utilities	$130,461,389

Specific Performance:

Delivery of Uranium Substantially on the Following Schedule

Year	Requirement type Exhibit B lbs	Fixed Type Exhibit C lbs	Rescheduled Deliveries
1980	530,000	1,262,000	
1981	779,007	2,692,000	
1982		2,232,000	
1983	1,015,000	1,772,000	
1984	410,000	1,772,000	
1985		1,772,000	385,000
1986		772,000	1,283,000
1987			2,295,500
1988			1,469,500
Total	2,754,007	12,274,000	5,433,000
TOTAL URANIUM DUE			20,461,007 lbs.

In the event that UNC accepts this proposal, and notifies GAC and Mr. John E. Scrivner, Regional Director of the American Arbitration Association at San Diego, California, of its acceptance on or before October 15, 1980, the Alternative Award may be considered as the Final Award.

The administrative fees, expenses and arbitrator's compensation totalling $127,490.26 shall be borne equally by the parties. Therefore, respondent shall pay to claimant the sum of $36,045.04 for that portion of the fees, expenses and arbitrator's compensation previously advanced by the claimant to the Association, and respondent shall pay to the American Arbitration Association $793.77 for the balance of the administrative fees, expenses and arbitrator's compensation still due the Association.

/s/ WILLARD WIRTZ
Willard Wirtz

/s/ WALTER V. SCHAEFER
Walter V. Schaefer

September 10, 1980

ATTACHMENT A — 1

BIGBEE, STEPHENSON, CARPENTER,
CROUT & OLMSTED
Attorneys at Law
Bokum Building, 142 W. Palace Avenue
Post Office Box 669
Santa Fe, New Mexico 87501

June 5, 1980

John E. Scrivner
Regional Director
American Arbitration Association
530 Broadway
San Diego, California 92101
Re: Arbitration No. 73-10-0078-88

Dear Mr. Scrivner:

UNC continues to protest any and all proceedings in the above referenced arbitration ("the San Diego arbitration"). Among other things, our protest is on the basis that final New Mexico court judgments have declared that GAC has waived any right it had to arbitrate with UNC, that the disputes between UNC and GAC are non-arbitrable, and that the contract under which these proceedings purport to take place is "null, void and unenforceable." These New Mexico judgments, and the constitutional guarantee to full faith and credit of state court judgments, bar the San Diego arbitration.

With the specific intent not to waive the contention that the San Diego arbitration is without jurisdiction and proceeding unlawfully, we feel compelled to bring certain recently discovered factual matters to the attention of the AAA relating to the qualifications and disclosure obligations of the neutral arbitrator, Walter V. Schaefer. We are reliably informed, and believe the following facts to be true:

1. Mr. Schaefer's son-in-law, a lawyer named Chester T. Kamin, is directly opposed to UNC in an Illinois lawsuit. Mr.

Kamin, a partner in the Chicago firm of Jenner & Block, is lead counsel for Energy Conversion Devices, Inc. ("ECD"), in a suit involving UNC and ECD relating to an agreement to share scientific technology.

2. Mr. Kamin's client (ECD) is controlled, in whole or in part, by Atlantic Richfield Company, whose Anaconda Co. subsidiary is a direct and substantial competitor of UNC in the uranium business.

3. Mr. Kamin's law firm, Jenner & Block, along with this firm, represented UNC in 1976 in its efforts to prevent arbitration involving Commonwealth Edison, Gulf Oil Corporation and General Atomic Company. This Chicago arbitration, like the San Diego arbitration, involves a dispute over uranium supply.

4. The Jenner & Block associate who performed the majority of the work involved in Jenner & Block's representation for UNC in its effort to prevent arbitration was Henry M. Schaffer. Henry Schaffer left Jenner & Block and joined Rothchild, Barry & Myers, the law firm with which Walter V. Schaefer is associated.

5. Mr. Kamin's firm, Jenner & Block, also represents Rio Algom Corporation in Illinois Federal Court in a lawsuit in which Westinghouse has sued Rio Algom and twenty-eight other defendants (including UNC) for violation of U.S. antitrust laws. Gulf and Rio Algom are the only two domestic companies charged by Westinghouse with hindering discovery procedures by placing cartel documents outside the United States in Canada. Westinghouse is currently seeking default judgment against Rio Algom, Gulf and Gulf Minerals Canada Ltd. — the only three companies against whom default judgment is sought for bad faith discovery failures. Obviously, Jenner & Block and Rio Algom share a common interest with Gulf and GAC in minimizing the impact of the uranium cartel and discovery failures relating thereto. This uranium cartel and related discovery failures were the direct cause of the default judgment entered against GAC in the New Mexico litigation.

6. In February, 1980, Gulf filed a request in the Westinghouse antitrust litigation in Chicago that a special master be appointed to hear evidence and render an advisory opinion regarding Westinghouse's allegations of bad faith in discovery by Gulf, Rio Algom and others. On April 13, 1980, Gulf submitted an "anonymous note" to the presiding district judge, recommending that Walter V. Schaefer be appointed as the special master to hear evidence on the uranium cartel related discovery failures of Gulf and the client of his son-in-law's firm, Rio Algom. Gulf's secret suggestion that Mr. Schaefer preside over these hearings occurred after the issuance of the arbitrators' Partial Award which declared the New Mexico default judgment, entered against GAC for its bad faith cartel discovery failures, to be a legal nullity.

7. At a meeting of the San Diego arbitration on December 28, 1978, Mr. Schaefer made a disclosure statement to the parties. However, the facts stated in paragraphs numbered 1 through 6 above were not disclosed by Mr. Schaefer on December 28, 1978 or at any other time during the course of the San Diego arbitration.

In light of Section 18 of the Commercial Arbitration Rules of the American Arbitration Association, the foregoing matters should be of particular interest to you.

Very truly yours,

/s/ DONNAN STEPHENSON
Donnan Stephenson

cc: James F. Stiven

ATTACHMENT A — 2

AMERICAN ARBITRATION ASSOCIATION
(COMMERCIAL ARBITRATION RULES)

No. 73-10-9978-77

IN THE MATTER OF AN ARBITRATION
BETWEEN
GENERAL ATOMIC COMPANY (GAC),
and
UNITED NUCLEAR CORPORATION (UNC).

TRANSCRIPT OF PROCEEDINGS
MONDAY MORNING SESSION
VOLUME I
June 16, 1980
SAN DIEGO, CALIFORNIA

REPORTED BY: FRANK O. NELSON, CSR #686

San Diego, California
June 16, 1980
10:05 A.M.
[pp. 3-4]

JUSTICE SCHAEFER: Are you ready to proceed?

THE REPORTER: Yes, sir.

JUSTICE SCHAEFER: Do you have appearances?

THE REPORTER: Yes, sir.

JUSTICE SCHAEFER: Very well. Good morning, gentlemen.

(All respond)

JUSTICE SCHAEFER: Mr. Scrivner advises me that he has some matters he wishes to present. Mr. Scrivner?

MR. SCRIVNER: Yes, Judge Schaefer.

At this time I wish to present to you a letter that was written by Mr. Stephenson and directed to me as the Regional Director of the AAA, dated June 5 and received on June 9, 1980.

This is a copy of that letter.

JUSTICE SCHAEFER: Yes. Now, I have seen a copy of this letter. And I would like to make the following statement concerning it:

None of the matters mentioned in this letter are relevant to my qualifications as an arbitrator, or to my disclosure obligations in this case.

I had no knowledge of any of the matters stated in paragraphs 1 through 6 until after I was advised of the existence of this letter.

One further comment: Mr. Henry Shaffer, who is completely unrelated to me, was, according to the records of the firm with which I am of counsel, Rothschild, Barry and Myers, paid by that firm from September 11, 1977 to October 31, 1978.

That concludes what I have to say with respect to that letter.

Do you have any further statement, Mr. Scrivner?

MR. SCRIVNER: Yes, Judge Schaefer, I have.

In response to that letter, I acknowledged the receipt of it by telephone, and confirmed by letter to both parties, and I asked for the comments from General Atomic Company.

On June 11, 1980, I received this letter, Judge Schaefer, from Mr. Stiven representing GAC, in response to my request.

JUSTICE SCHAEFER: I think it would be wise, for the record, to identify these documents.

The first letter to which Mr. Scrivner [end of excerpt]

ATTACHMENT A — 3

AMERICAN ARBITRATION ASSOCIATION
(COMMERCIAL ARBITRATION RULES)

No. 73-10-9978-77

IN THE MATTER OF AN ARBITRATION
BETWEEN
GENERAL ATOMIC COMPANY (GAC),
and
UNITED NUCLEAR CORPORATION (UNC).

TRANSCRIPT OF PROCEEDINGS
TUESDAY MORNING SESSION
VOLUME II
June 17, 1980
SAN DIEGO, CALIFORNIA
REPORTED BY: WILLIAM MACAUELY CSR #311

[p. 5]

JUSTICE SCHAEFER: That is the American Arbitration Association Exhibit A-AAA-3, yes.

MR. SCRIVNER: There was an inquiry yesterday as to the Association's position, the American Arbitration Association's position, relating to the information furnished by these letters, and the interpretation of various rules of the Commerical Arbitration Rules.

Based on the information furnished by both parties and the American Arbitration Association Exhibits A-AAA-1 and A-AAA-2, letters, and by the statement of the neutral arbitrator, and in accordance with Section 19 of the rules entitled "Disclosure and Challenge Procedures," the AAA has

carefully considered all the information furnished and has determined that any challenge to Judge Schaefer's neutrality in these proceedings is overruled, and that the AAA reconfirms Judge Schaefer's appointment as the neutral arbitrator in this matter.

Relating to the section of the rules entitled Section 20, an arbitration in the absence of a party, it is the American Arbitration Association's position that that is a matter to be determined by the arbitrators, as is indicated in Section 53 of the rules which is entitled "Interpretation and [end of excerpt]

ATTACHMENT A — 4

RECEIVED
JULY 2, 1980

AMERICAN ARBITRATION
SAN DIEGO

JULIAN H. LEVI
P.O. BOX 1784
SANTA FE, NEW MEXICO 87501

June 30, 1980

Mr. John E. Scrivner
Regional Director
American Arbitration Association
530 Broadway
San Diego, California 92101

Re: United Nuclear Corporation and General Atomic Company, AAA #73 10 0078 77

Dear Mr. Scrivner:

Confirming my conversation with you this morning:

I have now seen the transcript of proceedings in the above matter before Arbitrators Schaefer and Wirtz held in San Diego on June 16 and 17, 1980.

I note therein discussion of my resignation which makes this communication necessary.

My resignation was in no sense procured, requested, or suggested by United Nuclear Corporation, its counsel, or anyone acting on its behalf.

The decision to resign was my personal decision. On March 11, 1980, I sustained a cerebral episode which resulted in my hospitalization. At the direction of my physician, I now carry a medical history with me at all times. Under these circumstances, I came to the conclusion that in fairness to the

parties, and to my family, I should not continue to act as an arbitrator.

I naturally bitterly resent the aspersions appearing on the record and the now consequent invasion of my privacy.

I appreciate your assurance that you will place this letter on record in the proceedings.

Very truly yours,

/s/ JULIAN H. LEVI
Julian H. Levi

APPENDIX F

IN THE SUPREME COURT OF
THE STATE OF NEW MEXICO

No. 13,236

UNITED NUCLEAR CORPORATION,
Plaintiff-Appellee,

v.

GENERAL ATOMIC COMPANY,
Defendant-Appellant,

and

INDIANA & MICHIGAN ELECTRIC COMPANY,
Defendant-Appellee.

MOTION FOR REHEARING

Defendant-Appellant, General Atomic Company ("GAC"), respectfully moves for a rehearing in this Cause and as grounds therefor states that the Court has overlooked or misapprehended the following points of fact or law:

1. This Court overlooked a unanimous line of Federal Court decisions and misapprehended the intent of Congress with respect to jurisdiction and venue to vacate arbitration awards.

2. This Court's decision totally overlooks the Arbitration Panel's November 14, 1979 Partial Award.

3. This Court overlooked the fact that UNC voluntarily submitted the *res judicata* and full-faith-and-credit issues to the Arbitration Panel, told the Panel that it had the jurisdiction and power to resolve those issues, and insisted that the issues be resolved by the panel prior to hearings on the merits.

4. This Court overlooked two final decisions of federal courts that the arbitration panel had authority to hear and decide the *res judicata* and full faith and credit issues.

5. This Court overlooked the ruling of the United States Supreme Court in *Donovan* v. *City of Dallas*, 377 U.S. 408 (1964) that a federal forum (in this case the federal arbitration panel) called on to rule on an issue already decided by a state court had the power and duty to decide the *res judicata* effect of that prior decision.

6. This Court misapprehended GAC's principal contention as to why the Musgrove decision violates the mandates of *Felter I* and *Felter II*.

7. This Court overlooked the controlling decision of *Prima Paint Corp.* v. *Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967) in ruling that the Santa Fe Court, rather than the arbitration panel, had the power to decide the validity of the contract containing the arbitration clause.

8. This Court misapprehended the right of GAC to arbitrate in San Diego under the Federal Arbitration Act and misapprehended why GAC did not file its Demand for Arbitration and Application for Stay until twenty-three months after the filing of the complaint.

A brief elaborating on these grounds for rehearing is filed herewith.

Respectfully submitted,

MONTGOMERY & ANDREWS, P.A.
SETH D. MONTGOMERY
P.O. Box 2307
Santa Fe, New Mexico 87501
Telephone: (505) 982-3873
and
RODEY, DICKASON, SLOAN,
AKIN & ROBB, P.A.

/s/ By JOHN P. EASTHAM

JOHN P. EASTHAM
RICHARD C. MINZNER
Post Office Box 1888
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Attorneys for General Atomic Company

(Of Counsel)
NATHAN LEWIN
MILLER, CASSIDY, LARROCA & LEWIN
2555 M Street, N.W.
Suite 500
Washington, D.C. 20037
(202) 293-6400

We hereby certify that a copy of the foregoing Motion was mailed to opposing counsel of record this 27th day of September, 1982

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

/s/ By JOHN P. EASTHAM

IN THE SUPREME COURT OF
THE STATE OF NEW MEXICO

No. 13536

UNITED NUCLEAR CORPORATION,
Plaintiff-Appellee,

v.

GENERAL ATOMIC COMPANY,
Defendant-Appellant,

and

INDIANA & MICHIGAN ELECTRIC COMPANY,
Defendant-Appellee.

APPEAL FROM SANTA FE COUNTY
CAUSE NO. 50827

The Honorable James W. Musgrove, Judge

APPELLANT'S BRIEF IN CHIEF

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BRIEF IN SUPPORT OF MOTION FOR REHEARING

Defendant-Appellant, General Atomic Company ("GAC"), has moved for rehearing in this Cause on eight grounds wherein the Court overlooked or misapprehended points of fact or law. This brief shows why each of the eight grounds compels the granting of the motion.

I.

THIS COURT OVERLOOKED A UNANIMOUS LINE OF FEDERAL COURT DECISIONS AND MISAPPREHENDED THE INTENT OF CONGRESS WITH RESPECT TO JURISDICTION AND VENUE TO VACATE ARBITRATION AWARDS.

This Court quotes the comments of Judge Enright and the Ninth Circuit regarding jurisdiction to enjoin arbitration proceedings initiated pursuant to the Federal Arbitration Act without an order of a Federal Court compelling arbitration (Opinion, pp. 6, 7). Both courts held that the Federal Court did not have jurisdiction to enjoin the arbitration and in passing indicated that UNC should seek its injunction in a State Court.[1] Neither Judge Enright nor the Ninth Circuit indicated or implied that the New Mexico courts would have the jurisdiction or the venue to vacate an arbitration award made in the Southern District of California. That would be clearly contrary

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[1] Since both Judge Enright and the Ninth Circuit ruled *for* GAC, GAC was not able to get either Court to correct its gratuitous dictum—which was specifically contrary to the decisions of the United States Supreme Court in *General Atomic Co.* v. *Felter*, 434 U.S. 12 (1977) ("Felter I") and *General Atomic Co.* v. *Felter*, 436 U.S. 493 (1978) ("Felter II"). It is noteworthy that UNC did not seek an injunction in a State Court as suggested by Judge Enright and the Ninth Circuit but instead, as indicated *infra* in Point III, presented its *res judicata* and full-faith-and-credit claims to the Arbitration Panel for resolution.

to federal law. This Court apparently overlooked or failed to consider *United States* v. *Ets-Hokin Corp.*, 397 F.2d 935 (9th Cir. 1968); *City of Naples* v. *Prepakt Concrete Co.*, 490 F.2d 182 (5th Cir.), *cert. denied*, 419 U.S. 843 (1974); *Arthur Imerman Undergarment Corp.* v. *Local 162, ILGWU*, 145 F.Supp. 14 (D.N.J. 1956); and *Long* v. *Marion Manufacturing Co.*, No. 74-659 (D.S.C. March 11, 1976) (attached to Appellant's Brief in Chief). Each clearly articulated Congress' intent that courts outside the federal district where an arbitration award is made do not have the power (in either a jurisdiction or venue sense) to vacate the award. It is totally illogical to presume that Congress intended to so restrict federal courts and yet intended to permit vacation by state courts thousands of miles away from the district where the award was made. In the entire 56-year history of the Act, not one court has come to that conclusion until Judge Musgrove made his ruling in this case.

This Court in concluding, without citation of authority of any kind, that the act's "provisions limit federal court venue but are not applicable to state courts" (Opinion, page 14) not only creates new and startling law, but also overlooks the Supreme Court decision in *National Bank* v. *Associates of Obstetrics & Female Surgery, Inc.*, 425 U.S. 460 (1976) cited in GAC's Brief in Chief.

On page 12 of its Opinion, this Court concludes that "GAC has now exhausted all possibilities for confirmation, according to its theory, and there is no further avenue open for UNC to seek to vacate the award." Of course this is not true; UNC may move to vacate the award in a California state court in San Diego (which is in the Southern District of California). If the judgment below is reversed and vacated, that forum is open and available.

II.

THIS COURT'S DECISION TOTALLY OVERLOOKS THE ARBITRATION PANEL'S NOVEMBER 14, 1979 PARTIAL AWARD.

This Court overlooked the fact that not one, but two awards were before Judge Musgrove: (1) the November 14, 1979 Partial Award and (2) the September 12, 1980 Final Award. Not once in its 17-page opinion does this Court ever mention the Partial Award, which, of course, contained the conclusion of the Panel on the *res judicata* issues. Judge Musgrove also ignored the fact that the Partial Award existed.[2]

UNC had specifically sought vacation of the Partial Award in its June 9, 1980 First Petition for Supplementary Relief. In its September 15, 1980 Second Petition for Supplementary Relief, UNC sought vacation of both the Partial Award and the Final Award. There was no valid reason or justification for Judge Musgrove to ignore the Partial Award. His disregard of UNC's petition to vacate the Partial Award constituted an acknowledgement that the Partial Award would invalidate the reasoning by which he vacated the Final Award. Judge Mus-

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[2] He incorrectly stated in his Finding of Fact No. 12 that the Panel announced on March 29, 1979 that it would not give full faith and credit to the New Mexico judgments and decisions. In fact, that decision was not announced until the Partial Award was issued on November 14, 1979. Nowhere in Judge Musgrove's Opinion, Decision or Judgment does he mention the Partial Award either by name or date. Neither this Court nor Judge Musgrove discuss the substance of that 38-page closely-reasoned decision. In failing to do so, this Court has either overlooked or misapprehended the federal rule for the review of arbitrator's awards under the Federal Arbitration Act articulated in cases such as *Boston & Maine Corp.* v. *Illinois Central R.R.*, 396 F.2d 425 (2d Cir. 1968) and *San Martine Compania de Navegacion, S.A.* v. *Saguenay Terminals Ltd.*, 293 F.2d 796 (9th Cir. 1961).

grove apparently found no grounds under the Federal Arbitration Act (9 U.S.C. § 10) for vacation of the Partial Award and did not cite any. He did not find any grounds under subsections a, b or c of Section 10 to vacate the Final Award and purported to vacate the Final Award on the ground that the Panel had exceeded its powers. But it is clear that the arbitrators did not exceed their powers in making the Partial Award. Two federal courts ruled that the Panel was an appropriate forum for resolving UNC's claims of *res judicata* and full faith and credit. See Point IV, *infra*. UNC submitted the *res judicata* and full-faith-and-credit issues to the Panel for resolution, insisted that they be resolved prior to hearings on the merits, and admitted on the record orally and in writing that the Panel had the "jurisdiction and the power" to resolve the *res judicata* and full-faith-and-credit issues. There was no specific finding by Judge Musgrove that the Panel did not have the power to decide the *res judicata* and full-faith-and-credit issues. The Panel in the Partial Award made a carefully reasoned, legally supported award on the *res judicata* and full-faith-and-credit issues submitted to the Panel by UNC.[3]

The validity of the Partial Award is critical to the validity of the Final Award. If the Partial Award is valid, the Final Award cannot be vacated on the grounds that the Panel erred in not according full faith and credit to the prior decisions of the New Mexico courts. This Court should grant this motion for rehearing, reverse the judgment below and order dismissal of the action below.

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[3] Judge Musgrove also attempted to justify his vacation of the Final Award on the basis that "in failing to give full faith and credit to the decisions of this Court and the New Mexico Supreme Court, the arbitrators acted in manifest disregard of the law." The judge failed to recognize that the full-faith-and-credit issue had been fully and definitively resolved in the earlier Partial Award and that the decision of the arbitrators set forth in the Partial Award was binding on the court unless and until the Partial Award was vacated pursuant to Section 10 of the Federal Arbitration Act.

III.

THIS COURT OVERLOOKED THE FACT THAT UNC VOLUNTARILY SUBMITTED THE *RES JUDICATA* AND FULL-FAITH-AND-CREDIT ISSUES TO THE ARBITRATION PANEL, TOLD THE PANEL THAT IT HAD THE JURISDICTION AND POWER TO RESOLVE THOSE ISSUES, AND INSISTED THAT THE ISSUES BE RESOLVED BY THE PANEL PRIOR TO HEARINGS ON THE MERITS.

This Court completely overlooked in its opinion the fact that UNC conceded to the Arbitration Panel that it had the jurisdiction and the power to decide the *res judicata* and full-faith-and-credit issues.

On May 30, 1978, subsequent to the issuance of the Santa Fe Court's May 17, 1978 Final Judgment and with full knowledge of it, the United States Supreme Court ruled that GAC had the right to seek arbitration of the same issues resolved by the Final Judgment *(Felter II)*. By reference to *Donovan* v. *City of Dallas*, 377 U.S. 408 (1964), the Supreme Court, in effect, said that the federal arbitration forum could decide "whether or not [UNC's] plea of *res judicata* . . . would be good." The principal dispute between UNC and GAC thereafter was whether arbitration of disputes arising under the 1973 Supply Agreement were precluded by the judgments of the New Mexico courts issued while arbitration was illegally enjoined. UNC attempted to have that dispute resolved in the federal courts but Judge Bratton, after hearing UNC's argument that the 1973 Supply Agreement had been declared void, rejected UNC's contentions. On September 27, 1978 he ruled that the Arbitration Panel was an appropriate forum for the resolution of the full-faith-and-credit dispute and that the GAC-UNC arbitration agreement in the 1973 Supply Agreement was broad enough to cover that dispute. UNC then voluntarily submitted the *res judicata* and full-faith-and-credit issues to the Arbitration Panel, fully briefed and argued the issues before the Panel, told the Panel that the Panel had the

"jurisdiction and the power" to decide the issues, and insisted on a decision on the issues prior to hearings on the merits.[4]

This Court should grant this motion for rehearing and dismiss the action since UNC has conceded that the Panel had the power and jurisdiction to decide the *res judicata* and full-faith-and-credit issues.

IV.

THIS COURT OVERLOOKED TWO FINAL DECISIONS OF FEDERAL COURTS THAT THE ARBITRATION PANEL HAD AUTHORITY TO HEAR AND DECIDE THE *RES JUDICATA* AND FULL-FAITH-AND-CREDIT ISSUES.

We noted in Point III the September 27, 1978 decision of Judge Bratton that the Arbitration Panel was an appropriate forum for the resolution of the full-faith-and-credit and *res judicata* issues. We quoted Judge Bratton's ruling on page 26 of our brief in chief. We quoted a later decision by Judge Enright on page 27 of our brief in chief. Both of these decisions became final decisions and were binding on UNC. Yet this

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[4] In its January 15, 1979 Memorandum of Position filed with the Arbitrators, UNC stated:

> The significance of the U.S. Supreme Court opinion concerning the disputes between UNC and GAC is apparent in light of the case of *Donovan* v. *City of Dallas*, 377 U.S. 408 (1964), which holds that claims of *res judicata* (or full faith and credit, for that matter) must be pressed before the tribunal where the suit pends (which UNC is doing before this Panel) . . . .

In oral argument before the Panel on March 27, 1979 on whether *res judicata* and full faith and credit should be accorded to the New Mexico judgments, UNC's attorney said (R.2490-91):

> Obviously. I think you have jurisdiction and power to decide whether they are *res judicata* . . . . Judge Bratton said the panel should decide the full faith and credit claims of United Nuclear. *Telephone Union* says that is the first thing you should do. You do have the power, you have the jurisdiction.

Court disposes of these two consistent federal decisions directly on point by referring to "somewhat conflicting language" in decisions by Judge Bratton and Judge Enright. Either the Court overlooked what these two judges ruled or at least misapprehended the significance of these holdings—one before the Partial Award and one after the Partial Award. In both cases, it was vital to the holding of the Court that UNC had an appropriate forum in which to present its *res judicata* and full-faith-and-credit claims. Accordingly, the decisions are binding on this Court when it determines whether the Panel had such power and authority. A rehearing should be granted to correct this error.

V.

THIS COURT OVERLOOKED THE RULING OF THE UNITED STATES SUPREME COURT IN *DONOVAN V. CITY OF DALLAS*, 377 U.S. 408 (1964) THAT A FEDERAL FORUM (IN THIS CASE THE FEDERAL ARBITRATION PANEL) CALLED ON TO RULE ON AN ISSUE ALREADY DECIDED BY A STATE COURT HAD THE POWER AND DUTY TO DECIDE THE *RES JUDICATA* EFFECT OF THAT PRIOR DECISION.

In spite of heavy reliance by the Supreme Court in *Felter I* and *Felter II* on *Donovan* v. *City of Dallas*, 377 U.S. 408 (1964) and heavy reliance on the same case by GAC in the instant case, this Court does not even mention the case. The significance of *Donovan* is that it makes plain that it is the *second* tribunal (there a federal district court—here a federal arbitration panel) which decides what *res judicata* effect should be given to a decision of the first tribunal (which was a state court in both *Donovan* and this case). It necessarily follows that the first tribunal cannot, after a second federal tribunal has ruled, undo the ruling of that second tribunal simply on the ground that the first tribunal's judgment is entitled to full faith and credit without violating the supremacy clause. Yet this is precisely the effect of what this Court has done in this case. A rehearing should be granted to prevent this violation of the *Donovan* holding.

VI.

THIS COURT MISAPPREHENDED GAC'S PRINCIPAL CONTENTION AS TO WHY THE MUSGROVE DECISION VIOLATES THE MANDATES OF *FELTER I* AND *FELTER II*.

Judge Musgrove ruled that Judge Felter's December 27, 1977 and April 4, 1978 decisions deprived the arbitrators of all powers "except the powers to dismiss the [arbitration] proceedings." This Court affirmed that ruling. Such an interpretation violates *Felter I* and *Felter II* in that the Supreme Court ruled in those decisions that Judge Felter was "totally without the power under the United States Constitution to interfere with efforts by GAC to obtain arbitration in federal forums." The Supreme Court in *Felter II* specifically held that Judge Felter's December 27, 1977 finding that GAC had waived its right to arbitrate did not restrict GAC from pursuing its arbitration claims. UNC has admitted (see Footnote 4) that the "significance of" *Felter I* and *Felter II* is that the Panel had the jurisdiction and the power to decide the *res judicata* and full-faith-and-credit issues. It is Judge Musgrove's interpretation of the pre-arbitration decision as having deprived the arbitrators of all powers "except the powers to dismiss" which directly violates *Felter I* and *Felter II*. Yet the opinion of this Court totally overlooks GAC's argument concerning this violation of *Felter I* and *Felter II*. This Court should grant GAC's request for rehearing and rule on GAC's specific contention of a direct violation by the court below of the decisions in *Felter I* and *Felter II*. UNC has conceded and GAC has shown that the Panel *did* have the power to resolve the issue of whether UNC's plea of *res judicata* was good.

VII.

THIS COURT OVERLOOKED THE CONTROLLING DECISION OF *PRIMA PAINT CORP. V. FLOOD & CONKLIN MANUFACTURING CO.*, 388 U.S. 395 (1967) IN RULING THAT THE SANTA FE COURT, RATHER THAN THE ARBITRATION PANEL, HAD THE POWER TO DECIDE THE VALIDITY OF THE CONTRACT CONTAINING THE ARBITRATION CLAUSE.

This Court ruled on page 15 of the opinion: "Our public policy also precludes our courts from enforcing arbitration agreements contained in contracts that the courts find were totally void from their inception." This holding is directly contrary to the controlling case of *Prima Paint Corp.* v. *Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967). That case makes it clear that the validity of an arbitration agreement must be considered separately from the validity of the contract in which it is contained. That case also clearly states that arbitrators, *not courts*, have the power to determine the validity of a contract containing an arbitration agreement, even where the attack attempts to void the entire contract.[5] The *Prima Paint* case was cited for this proposition in both briefs filed by GAC, but this Court not only failed to cite the case, but made a ruling contrary to this supreme law of the land. A rehearing should be granted to bring the decision of this Court in line with this decision of the United States Supreme Court.

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[5] UNC has never made the claim, and no court has ever found, that the GAC-UNC arbitration agreement itself was fraudulently induced, illegal, contrary to public policy or in any other way void or voidable.

VIII.

THIS COURT MISAPPREHENDED THE RIGHT OF GAC TO ARBITRATE IN SAN DIEGO UNDER THE FEDERAL ARBITRATION ACT AND MISAPPREHENDED WHY GAC DID NOT FILE ITS DEMAND FOR ARBITRATION AND AI PLICATION FOR STAY UNTIL TWENTY-THREE MONTHS AFTER THE FILING OF THE COMPLAINT.

The Court makes a point on page 2 of its opinion that after the issuance of Judge Felter's illegal injunction, GAC did not seek an order from Judge Felter compelling arbitration and that GAC did not seek a stay pending arbitration until after the injunction had been declared unconstitutional. It should be obvious to this Court that GAC had no desire to arbitrate "subject to the jurisdiction of [the Santa Fe] court," which was the only possibility of arbitration offered under Judge Felter's illegal injunction.

Rather than request Judge Felter to order arbitration in Santa Fe County, GAC sought to invalidate the illegal order so that arbitration could be held in California—a right which GAC had under the provisions of the Federal Arbitration Act. The Federal Arbitration Act authorizes a stay of judicial proceedings once an arbitration is underway (9 U.S.C. § 3). Because of the injunction, GAC could not initiate the arbitration in California, and it was, therefore, unable to seek a stay of the Santa Fe proceedings.

The implication on page 3 of the Opinion of this Court that GAC slept on its rights in failing to request a stay of the New Mexico proceeding for twenty-three months totally misapprehends the facts. As pointed out above, GAC was illegally enjoined from arbitrating in the locale of its choice in April, 1976. It was not until the end of November, 1977 that the injunction was lifted. GAC the very next day demanded arbitration in San Diego and then moved to stay the Santa Fe proceeding in favor of the San Diego arbitration. GAC could not move for a stay based on a San Diego arbitration until that arbitration was demanded. The Court should grant a rehearing

to correct this obvious misapprehension of the facts underlying this case.

CONCLUSION

We have shown eight different valid reasons compelling the granting of the motion for rehearing. We submit that this Court should do so.

Respectfully submitted,

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We hereby certify that a copy of the foregoing brief was mailed to opposing counsel of record this 27th day of September, 1982.

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/s/ By John P. Eastham
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APPENDIX G

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 78-522

UNITED NUCLEAR CORPORATION, a
DELAWARE CORPORATION, *Plaintiff,*

v.

AMERICAN ARBITRATION ASSOCIATION, a
NEW YORK CORPORATION, *Defendant.*

Memorandum Opinion

(Filed September 27, 1978)

This matter comes on for consideration upon the application of the plaintiff United Nuclear Corporation (UNC) for a preliminary and permanent injunction against arbitration proceedings instituted by the defendant American Arbitration Association (AAA).

The Court having considered the evidence and argument presented at the hearing in this matter, the pleadings and memoranda filed, together with the entire file in this cause, it is concluded that the application for a preliminary and permanent injunction filed by UNC should be dismissed for lack of subject matter jurisdiction.

This action is but one small episode in the larger litigation adventure of UNC and General Atomic Company (GAC) which began in 1975, and involves the construction, interpretation and validity of a uranium supply contract between the parties. A suit to determine these issues was filed in the state district court in Santa Fe County, New Mexico in 1975. After such filing and prior to trial, the state court enjoined

GAC from filing any action of any kind against UNC in any forum other than the Santa Fe court. When this order was held invalid by the United States Supreme Court in *General Atomic Company* v. *Felter* 434 U.S. 12 (1977), GAC demanded arbitration with UNC. The state court again stepped in and issued an order staying the arbitration proceedings. This order remained in effect until again held invalid by the United States Supreme Court in *General Atomic Company* v. *Felter* _____ U.S. _____, 56 L.Ed. 2d 480 (1978), on May 30, 1978. At that point, GAC renewed its arbitration demands, and on July 26, 1978 the AAA informed the parties that it was going to proceed with its administration of the arbitration demand. That decision is the subject of this action.

On July 31, 1978 UNC applied to the United States District Court for a temporary restraining order against the AAA. Jurisdiction of the Court was alleged on diversity of citizenship, 28 U.S.C. 1332. The order was issued that day and has, by agreement of the parties, remained in effect pending this decision in the matter.

To understand the basis for UNC's application for an injunction, it must be noted that the state court rendered a final decision against GAC in the litigation over the 1973 supply agreement on April 4, 1978. In that decision and in the Partial Final Judgments previously entered by the state court in December, 1977, the court found that the contract between the parties was void and unenforceable, and that GAC had waived any right to arbitration. UNC now claims, as the basis for their application for an injunction, that these judgments are *res judicata*. They assert that the state court has already determined both GAC's right to arbitration and the merits of any substantive claims which might be raised in arbitration. Thus they allege that to proceed with arbitration will deny them full faith and credit for these judgments, in violation of Article IV, Section 1 of the United States Constitution.

The AAA has filed a Motion to dismiss the complaint under Rule 19(b) for failure to join an indispensable party. It is the AAA's contention that GAC is an indispensable party

to this action, that its joinder would destroy complete diversity between the parties, and therefore that the action should be dismissed for lack of jurisdiction. GAC, appearing as *amicus curiae*, makes the same argument.

Rule 19 of the Federal Rules of Civil Procedure, 28 U.S.C.A. outlines three situations where because of the interest of an outsider in the action or the interest of the parties in complete relief, a person is found to be a "necessary" party, and required to be joined if feasible. The relevant portion of the Rule states that a person is necessary and shall be joined as a party if:

> "(2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of his claimed interest.

It is clear that GAC has an interest in the subject of this aciton, for it is their arbitration demand and the defendant's action upon it which triggered this suit. In fact, it is unclear that the AAA has any interest in this action as they are purely an administrative organization, and as stated at the hearing, do not care whether or not the dispute goes to arbitration. If GAC is not joined, its ability to protect its interest will be seriously impacted. The AAA, because of its neutrality will not act as an advocate to preserve GAC's rights. Yet, a decision in favor of UNC would deny or at least substantially delay GAC's arbitration rights. Thus, GAC does fall within the Rule 19(a)(2)(i) definition of a necessary party.

Though a person need only come within one clause of Rule 19(a)(2) to be a necessary party, it should be noted that GAC is also a necessary party under Rule 19(a)(2)(ii). If GAC is not joined in this action, and therefore not bound by the judgment of this Court, there is a substantial risk that the defendant may incure inconsistent obligations as a result of

GAC's interest in the arbitration proceedings. An injunction against the AAA in this action would halt the arbitration. However, GAC might well institute its own suit to compel arbitration, and if it prevailed, the AAA would be subject to inconsistent, indeed incompatible, court orders. Therefore, under either provision of Rule 19(a)(2), GAC is a necessary party to this litigation and should be joined.

However, GAC is a partnership composed of Gulf Oil Corporation, a Pennsylvania corporation and Scallop Nuclear, Inc., a Delaware corporation. UNC is also a Delaware corporation. For the purposes of diversity jurisdiction the "citizenship" of each member of a partnership must be considered, *Federal Resources Corp.* v. *Shoni Uranium Corp.* 408 F.2d 875 (10th Cir. 1969); *Arbuthnot* v. *State Auto Insurance Association* 264 F.2d 260 (10th Cir. 1959), and there must be complete diversity among the parties. Both Scallop Nuclear, Inc. and UNC are Delaware corporations. Therefore, the joinder of GAC would destroy complete diversity and would deprive this Court of jurisdiction under 28 U.S.C. 1332.

In such a situation, the Court is required, pursuant to Rule 19(b), to determine whether the absent party is indispensable. *Provident Tradesmens Bank* v. *Patterson* 390 U.S. 102 (1968). The test under Rule 19(b) is "whether in equity and good conscience the action should proceed among the parties before [the Court]." *Manygoats* v. *Kleppe* 558 F.2d 556 (10th Cir. 1977); *Wright* v. *First National Bank* 483 F.2d 73 (10th Cir. 1973). To make this decision the Court must consider the four factors outlined in the Rule.

The first factor requires consideration of the possible prejudice to GAC from a judgment rendered in its absence. This is very similar to the initial determination made under 19(a)(2)(i). If a judgment is entered in favor of UNC, GAC will have lost its current arbitration demand, or at least will have it delayed again. Any permanent injunction could amount to a declaration that GAC had waived its arbitration rights. Such a decision would be highly prejudicial to GAC.

Secondly, it seems unlikely that the Court could fashion its relief so as to diminish the prejudice to GAC and at the same time grant the relief requested by UNC. In this situation, the injunction is either granted or it is not. There do not appear to be any protective measures which the Court could use to modify an injunctive order to lessen the prejudice to GAC, and still provide effective relief to UNC.

The third factor outlined in Rule 19(b) has been interpreted to require the courts to examine the public stake in resolving all issues among the parties at one time. *Provident Tradesmens Bank* v. *Patterson, supra.* While this Court could decide the questions presented, and while the AAA is capable of carrying out any order of this Court, GAC would not be bound by such an order, and they could institute legal action elsewhere to compel arbitration. This likelihood of additional litigation, with its attendant costs in time and money, should be avoided where possible.

This possibility is considered in the final factor which requires that the Court determine whether a satisfactory alternative forum exists for the plaintiff. *Provident Tradesmens Bank* v. *Patterson, supra.* UNC has argued that there is no alternative forum, and that only a federal court can enjoin these arbitration proceedings. The AAA, on the other hand, argues that the arbitration panel itself can entertain the questions of *res judicata* and full faith and credit. This alternative appears to be an acceptable one. The language of the arbitration clause in the disputed contract appears broad enough to allow the arbitrators to hear this issue, and the AAA has itself acknowledged that it will consider the question.[1] Though

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[1] The arbitration clause is found in Article XVII of the 1973 Supply Agreement and provides:

> "In the event that *any disputes,* which may arise between the parties during the course of this Agreement, cannot be mutually resolved, either party may elect to submit such disputes to arbitration in accordance with the Rules of the American Arbitration Association. . . ." (emphasis added).

(*cont.*)

UNC would then have to go to arbitration to determine the initial propriety of the arbitration forum, their arguments would in fact be heard and considered. The inconvenience and cost to UNC of this route does not outweigh the prejudice to GAC if this action continues in its absence. The fact that the alternative forum is non-judicial does not seem relevant. The Tenth Circuit has previously approved consideration of a non-judicial forum, *Tewa Tesuque* v. *Morton* 498 F.2d 240 (10th Cir. 1974), *cert denied* 420 U.S. 962, and arbitration is a recognized arena for the settlement of disputes.

Thus the overall balance weighs in favor of a finding that GAC is an indispensable party. The fact that GAC did not move to intervene under Rule 24 does not dictate against this conclusion. Valuable rights belonging to GAC are at stake which cannot be protected either by the parties already present or by the Court through the fashioning of relief. Further, there is an alternative forum where all parties can be joined and can present their claims. Therefore, in equity and good conscience the Court cannot allow this action to proceed without GAC as a party, and since joinder would destroy complete diversity among the parties, it is the judgment of the Court that the action should be dismissed.

UNC has argued that the Court has jurisdiction independent of diversity of citizenship grounds under 28 U.S.C. 1331 in that their claim arises under the full faith and credit clause of Article IV, Section 1 of the United States Constitution. If this were so, GAC could be joined and the action could proceed regardless of the citizenship of the parties. However, the full faith and credit clause alone has never been found to be a sufficient basis for jurisdiction under §1331. In *Minnesota* v. *Northern Securities Co.* 194 U.S. 48 (1904), the Supreme Court considered whether an allegation that state statutes

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There is no express reservation of any issues from arbitration and in that case, it is presumed that all questions, both as to law and fact are in the jurisdiction of the arbitrators. *Continental Materials Corp.* v. *Gaddis Mining Co.* 306 F.2d 952 (10th Cir. 1962).

would be denied full faith and credit constituted a case arising under the Constitution sufficient to sustain federal court jurisdiction. The Court said:

> "We do not think that the clause of the Constitution above quoted has any bearing whatever upon the question under consideration. It only prescribes a rule by which courts, Federal and state, are to be guided when a question arises in the progress of a pending suit as to the faith and credit to be given by the court to the public acts, records, and judicial proceedings of a state other than that in which the Court is sitting. . . [T]o invoke the rule which it prescribes does not make a case arising under the Constitution or laws of the United States. 194 U.S. at 72.

The rule has been followed consistently by the lower courts faced with the question, *California* v. *Bruce,* 129 F.2d 421 (9th Cir. 1942); *Luterman* v. *Levin,* 318 F.2d 11 (D.Md.1970), and has been noted with approval elsewhere. *Hazen Research Inc.* v. *Omega Minerals, Inc.,* 497 F.2d 151 (5th Cir. 1974); 1A *Moore's Federal Practice* ¶ 0.311[2], at 3413 (2d.ed.).

The cases relied upon by UNC do not hold to the contrary. In *West Side R.R. Co.* v. *Pittsburgh Construction Co.,* 219 U.S. 111 (1911), the Supreme Court found that a claim under the full faith and credit clause presented a federal question for their review but did not consider whether such a claim was an independent basis for federal court jurisdiction. Similarly, in *Clifford* v. *Williamson,* 131 F. 100 (C.C.N.D. Wash. 1904) the court did not find the full faith and credit clause to be a basis for federal jurisdiction. In fact, the court specifically said the clause establishes "a rule of evidence, rather than a ground of jurisdiction," *Clifford* v. *Williamson, supra* at 105. While recognizing that a denial of full faith and credit would constitute a violation of the Constitution sufficient to allow a federal court to issue a writ of habeas corpus, the court never stated such would also establish federal question jurisdiction under §1331. The other cases cited speak to the importance of the full faith and credit clause in our

jurisprudence, but do not hold that it is a basis for jurisdiction under §1331. *See Riley* v. *New York Trust Co.*, 315 U.S. 343 (1942); *Durfee* v. *Duke*, 375 U.S. 106 (1963).

Therefore, the Court having determined that GAC is a necessary party under Rule 19(a) and that its joinder would deprive the Court of jurisdiction, and further that in equity and good conscience this action cannot proceed without it, and thus that GAC is an indispensable party under Rule 19(b), and there being no other basis for jurisdiction, it is concluded that this action should be dismissed. An Order will be entered in accordance herewith.

/s/ HOWARD BRATTON
United States District Judge

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 79-329-E

UNITED NUCLEAR CORPORATION, *Plaintiff,*

v.

GENERAL ATOMIC COMPANY, *Defendant.*

Civil No. 80-339-E

UNITED NUCLEAR CORPORATION, *Plaintiff,*

v.

GULF OIL CORPORATION, *Defendant.*

Memorandum Decision

(Filed May 7, 1980)

United Nuclear Corporation filed its first lawsuit in this court against General Atomic Company, a partnership composed of Scallop Nuclear, Inc. and Gulf Oil Corporation. In three previous memorandum decisions, this court decided that neither federal question jurisdiction nor diversity jurisdiction existed, and that United Nuclear would not be given a third chance to state a basis for this court's jurisdiction over the dispute. Frustrated in its attempt to drop the partnership as a defendant and substitute only the diverse partner, Gulf Oil Corporation, United Nuclear has filed a new lawsuit against Gulf alone. In addition, it seeks a preliminary injunction preventing the resumption of arbitration and an injunction pending appeal in the case previously dismissed. Gulf moves the court to dismiss the new lawsuit for failure to join an in-

dispensable party, the partnership General Atomic Company. Upon due consideration of the parties' memoranda and the arguments advanced at the hearing, and for the reasons set forth below, the court dismisses the action for failure to join General Atomic Company and denies the motions for injunction.

The joinder of parties needed for just adjudication is governed by Federal Rule of Civil Procedure 19, which sets forth a two-part analysis. First, the court must determine whether the absent party should be joined if feasible. The considerations at this juncture are whether complete relief can be afforded among those already parties or whether the missing party claims an interest in the subject of the action and is so situated that the disposition of the action may impair his ability to protect that interest or leave any party subject to multiple or inconsistent obligations. If the absent party fits either of these criteria he should be joined. If he cannot be made a party, the court proceeds to the second part of the analysis to determine whether "in equity and good conscience" the action should be dismissed. In making this determination, the court should consider the extent to which a judgment rendered in the party's absence will be prejudicial, the extent to which the judgment can be shaped to avoid prejudice, whether the judgment will be adequate, and whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

In the instant case, General Atomic Company has an interest in the subject of the action, which is the arbitration proceeding in San Diego. General Atomic initiated the arbitration proceedings which United Nuclear Corporation seeks to enjoin through this lawsuit. United Nuclear seeks to use a state court judgment it obtained against General Atomic as a bar to arbitration. The partnership has an interest in the resolution of these *res judicata* claims. United Nuclear has recognized this interest by prosecuting its previous action against General Atomic on alternate jurisdictional theories for almost a year before attempting to substitute only Gulf Oil

Corporation as a defendant. To afford complete relief among the parties, the partnership, which initiated the arbitration proceedings, should be joined. The court concludes that General Atomic Company is a party to be joined if feasible.

General Atomic cannot be joined without destroying diversity among the parties, so the court must consider whether in equity and good conscience the action may proceed with the present parties. The first factor to be considered is the prejudice to the absent party. This test is closely related to the preliminary question of whether the absent party has an interest in the litigation. 3A *Moore's Federal Practice* ¶ 19.11, at 19-233 (1979 ed.). If United Nuclear succeeds in its suit to enjoin Gulf from participating in the arbitration proceedings, General Atomic's requested arbitration will be seriously undermined.

The second factor the court should consider is whether it can tailor any possible judgment to avoid prejudice to the absent party. If this court were to take jurisdiction of this suit to enjoin arbitration, and were to hold that the judgment rendered by the New Mexico state court against General Atomic is *res judicata,* such an order could not be modified to avoid prejudice to General Atomic Company.

The third factor is whether a judgment rendered in the party's absence would be adequate. Although it may be possible to put an end to the arbitration through a judgment against Gulf Oil alone, the Supreme Court in *Provident Tradesmens B. & T. Co.* v. *Patterson,* 390 U.S. 113, 88 S. Ct. 733, 19 L. Ed. 2d 936 (1968), stated that a judgment's adequacy should also be tested with reference to the "interest of the courts and the public in the complete, consistent and efficient settlement of controversies." *Id.* at 111, 88 S. Ct. at 739. A complete and efficient judgment would include the partnership, which initiated the arbitration proceedings. Moreover, it is questionable if a judgment against Gulf Oil would also be binding on Scallop Nuclear, Inc., General Atomic's other partner.

The final factor to be considered is the adequacy of alternative remedies. Judge Bratton held in a similar suit against the American Arbitration Association to enjoin the San Diego arbitration that General Atomic Company was an indispensable party and that an adequate alternative forum — arbitration — existed for resolution of the *res judicata* and full faith and credit claims. The parties have submitted these claims to the arbitration panel in San Diego and have received an opinion, demonstrating that the alternative forum is indeed available and being utilized. Moreover, in the arbitration forum, all parties may be included.

The court does not believe an injunction against arbitration is warranted in any event, either as a preliminary matter or pending appeal in either case. The standards used in this circuit for testing such a request are set forth in *Wm. Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 526 F.2d 86 (9th Cir. 1975), and *Benda* v. *Grand Lodge of the Internat'l Assoc. of Machinists*, 584 F.2d 308, 315 (9th Cir. 1978). Those cases describe two tests used for testing an application for an injunction. The moving party must demonstrate either (1) probable success on the merits and the possibility of irreparable injury or (2) serious questions are presented and the balance of hardships tips sharply in movant's favor. These tests are not to be rigidly applied, but instead represent extremes along a continuum. If the showing of success on the merits is particularly strong, the showing of irreparable injury need not be as compelling. However, if success on the merits is not "probable," the balance of hardships must favor the movants.

In the instant case, serious questions are presented by the fact that a state court judgment exists which holds that the parties have waived arbitration. However, the potential success on the merits cannot be characterized as "probable." The arbitration panel has already considered the issue and decided that the state court decision was *coram non judice*— that is, taken by a court without power to act. Accordingly, it found that the state judgment was not entitled to full faith and

credit. In addition, the review of an arbitration decision is limited under the Federal Arbitration Act, imposing upon the plaintiffs herein a more difficult task in convincing this court that the arbitration panel erred. In reviewing the arbitration panel's decision the court believes that there is considerable merit to the conclusions reached by the panel.

Because serious questions are presented, plaintiff must show that the balance of hardships tips in its favor. The plaintiff's asserted injury is the time and expense of arbitration, coupled with the fact that the pendency of the lawsuit unfavorably affects its ability to do business. However, the Supreme Court has held, albeit in another context, that "mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 24, 94 S. Ct. 1028, 39 L. Ed. 2d 123 (1974). In addition, it is likely that any substantial commercial litigation will affect the business prospects of the companies involved. This result is no less true for the plaintiff than it is for the defendant. This argument could be used to justify a preliminary injunction whenever a large company is involved in a major legal action.

Plaintiff also argues that it suffers irreparable injury because its constitutional rights to have its New Mexico judgment enforced are being violated by the arbitration panel. It argues that the public has an interest in ensuring the validity of state court judgments. However, United Nuclear will not be precluded from seeking review of the arbitration decision at all. Instead, it will be required to seek review of the entire arbitration award through a motion to vacate or confirm the award. In addition, the public interest may just as well be served by the arbitration of disputes and review of an eventual decision only when a complete award is had.

For the reasons stated above, the court would decline to grant plaintiff's request for a preliminary injunction, or an injunction pending appeal in either case.

It is so ordered.

DATED: May 6, 1980.

/s/ WILLIAM B. ENRIGHT
William B. Enright, *Judge*
United States District Court

Copies to:

Plaintiff
Defendants

APPENDIX I

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

CIVIL ACTION NO. 74-659

W. B. LONG, d/b/a W. B. LONG COMPANY, and
ROBERT MANNING, JR., d/b/a WEBB COTTON COMPANY,
Plaintiffs,

v.

MARION MANUFACTURING COMPANY, a CORPORATION,
Defendant.

March 11 1976

ORDER ON PLAINTIFFS' MOTION TO CONFIRM ARBITRATION AWARD

This action involves a dispute concerning certain contracts between the parties for the sale and delivery of cotton. Defendant, Marion Manufacturing Co., previously moved to compel arbitration of the dispute under the provisions of 9 U.S.C. § 1, et seq., and that motion was granted by this court's order of July 16, 1974, affirmed in *Long* v. *Marion Mfg. Co.*, 511 F.2d 1398 (4th Cir. 1975). The arbitration thus ordered was conducted by an organization known as the Cotton States Arbitration Board, and headquartered in Memphis, Tennessee, and an award made on August 4, 1975. Plaintiff now moves pursuant to 9 U.S.C. § 9[1] for an order confirming the Board's award and

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[1] 9 U.S.C. § 9 provides: Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one

requiring defendant to comply with its terms. Defendant opposes confirmation on the grounds that this court lacks jurisdiction to confirm and that the language of the award is so ambiguous as to require a remand to the arbitrators for clarification. Defendant, however, has not moved to have this court vacate or remand the award, contending that the court also lacks jurisdiction to take that action.

The order compelling arbitration was correct and within the jurisdiction of this court, as the Fourth Circuit recognized when it affirmed that decision. 511 F.2d 1398. If defendant's contentions are correct, however, the court is placed in the unusual position of being powerless to confirm or enter judgment upon the award of the very arbitration which it ordered to be carried out.

Defendant's decision not to move that the arbitration award be vacated or remanded was well-founded, because 9 U.S.C. § 10 designates only "the United States Court in and for the district wherein the award was made" as being empowered to

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year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

take such action.[2] The provision has been construed to mean what it says. *United States* v. *Ets-Hokin Corp.*, 397 F.2d 935 (9th Cir. 1968); *City of Naples* v. *Prepakt Concrete Co.*, 490 F.2d 182 (5th Cir. 1974), reh. denied, 494 F.2d 511. Moreover, defendant appears destined to run afoul of the three-month time limitation which 9 U.S.C. § 12 establishes for notice of motions to vacate or modify an award. There is some authority for the proposition that matters which might justify vacation or remand can properly be raised in defense of a motion to confirm an award. *The Hartbridge*, 57 F.2d 672 (2d Cir. 1932); *Catz American Co.* v. *Pearl Grange Fruit Exchange, Inc.*, 292 F.Supp. 549 (S.D.N.Y. 1968); *Fukaya Trading Co., S.A.* v. *Eastern Marine Corp.*, 322 F.Supp. 278 (E.D.La. 1971). Even so, it appears that, in this action, the court also lacks jurisdiction to confirm the arbitration award.

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[2] 9 U.S.C. § 10 provides: Same; vacation; grounds; rehearing

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration —

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

9 U.S.C. § 11 is a similar grant of jurisdiction to correct certain "evident" errors or defects in form.

9 U.S.C. § 9 allows the parties to an arbitration agreement to specify a district court of their choice to confirm their award and enter judgment upon it. Absent such specification, the statute itself grants jurisdiction to confirm to the district court for the district within which the award was made. 9 U.S.C. § 4 limits jurisdiction to compel arbitration to those courts which, absent the arbitration agreement, would have jurisdiction of the underlying controversy between the parties.[3] Section 9

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[3] 9 U.S.C. § 4 provides: Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdicion under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Proce-

may confer jurisdiction to confirm an award upon a court in a district which has no relationship whatsoever with the underlying dispute between the parties; nevertheless, the statute in no way indicates that a court has jurisdiction to confirm an award simply because it does have jurisdiction of the underlying controversy.

Congress generally may establish the jurisdiction of federal district courts in whatever manner it chooses, and § 9 represents an unambiguous manifestation of that authority. Though it is somewhat less than logical to preclude a court which has compelled arbitration in a pending action from confirming the resulting award, § 9 does not grant such authority to this court in this particular action. The agreement of the parties did not specify this court as the desired vehicle for confirmation, and the arbitration award was made in Memphis, Tennessee, headquarters of the Cotton States Arbitration Board. Neither of the statutory bases for jurisdiction exist, and the court is powerless to act upon plaintiffs' motion to confirm the arbitration award.

At first glance, it appears that this undesirable situation could have been avoided had this court ordered the arbitration to be conducted within the District of South Carolina as 9 U.S.C. § 4 suggests.[4] Such a requirement, however, would have been inconsistent with that portion of § 4 which directs

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dure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

[4] After granting jurisdiction to compel arbitration, § 4 provides, "The hearings and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed."

that the court "make an order directing the parties to proceed to arbitration *in accordance with the terms of the agreement.*" In addition, by forcing the parties to deviate from a significant term of a negotiated agreement, the court would not further the purposes of the Arbitration Act—to eliminate the expense and delay of litigation for the courts and the parties and to promote industrial peace and stability by expediting and facilitating private settlement of disputes according to guidelines established by the parties themselves.

The arbitration statutes contemplate that arbitration will be compelled, conducted, and confirmed within a single district; nevertheless, it is necessary to construe the requirement that arbitration be held within the district of the court which compels it, as analogous to a venue provision which is waivable and waived when the parties have already agreed to arbitrate elsewhere. *Cf. City of Naples* v. *Prepakt Concrete Co., supra; See also Arthur Imerman Undergarment Corp.* v. *Local 162,* ILGWV, 145 F.Supp. 14 (D.N.J. 1956). This construction preserves the integrity of the arbitration agreement. It also produces the undesirable result evident in this case, *i.e.*, the court which compels arbitration may be unable to confirm it, but it allows the parties to inflict this inconvenience upon themselves only if they wish to do so. The parties in this action voluntarily engaged in business transactions which led to a lawsuit justiciable in South Carolina, and they entered into an arbitration agreement; by these actions they established jurisdiction to compel arbitration between them in the district court of South Carolina. Their agreement failed to specify South Carolina as the proper district for confirmation of the arbitration award, though it could have so provided. By then agreeing to have the arbitration conducted in Tennessee, the parties expressed their preference for that location and finally guaranteed that only a district court in Tennessee would have jurisdiction to confirm or vacate the award.

The parties in this action therefore have selected the locations in which they were willing to conduct their business and now must abide by their choices. By construing the location

provision of § 4 as waivable and allowing the arbitration to be conducted in Tennessee, the court has both deferred to the wishes of the litigants and perhaps prevented future jurisdictional dilemmas potentially greater than the one it has created. At least one court has held that § 4 *requires* a court to compel arbitration within the district in which it sits. *Econo-Car International, Inc.* v. *Antilles Car Rentals, Inc.*, 499 F.2d 1391 (3d Cir. 1974). In *Econo-Car*, the underlying dispute between the parties arose in the Virgin Islands and jurisdiction and venue would have been proper in a diversity action brought there. Econo-Car commenced an action in the district court for the Virgin Islands to compel arbitration under the terms of an agreement specifying New York as the site of the proceedings. The district court ordered arbitration in New York pursuant to the agreement but the Third Circuit reversed, holding that § 4 required that the proceedings take place in the Virgin Islands.

The result in *Econo-Car* required that arbitration between the parties be held in the Virgin Islands, contrary to their agreement, solely because the action to compel arbitration had been brought there. The Third Circuit was aware, however, that if either party had moved in the Southern District of New York to compel arbitration, the court there would have concluded that it had jurisdiction, that venue was proper and that arbitration must be compelled according to the terms of the agreement.[5] Under such circumstances, the parties have no

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[5] In such cases where the underlying dispute is properly the subject of a diversity action, New York Courts have consistently entertained motions to compel arbitration, holding that an agreement to arbitrate in New York waives any objections to venue in an action brought there to compel arbitration. *E.g.*, *Farr & Co.* v. *CIA Intercontinental De Navegacion De Cuba, S.A.*, 243 F.2d 342 (2d Cir. 1957); *Joseph Muller Corp. Zurich* v. *Commonwealth Petrochemicals, Inc.*, 334 F.Supp. 1013 (S.D.N.Y. 1971). If the agreement of the parties provides for arbitration in New York it must take place there. *Lawn* v. *Franklin*, 328 F.Supp. 791 (S.D.N.Y. 1971).

assurance of the sanctity of their agreement and a significant facet of the eventual arbitration (location), is determined solely by the location of the district in which the action to compel arbitration is brought. In the event that both parties simultaneously attempt to compel arbitration in two different districts, there arises a jurisdictional conflict of massive proportions indeed. This situation appears to be an intolerable one, especially when it can be avoided by following the course which the court has directed in the proceedings here. Although the inconvenience which the parties and the court are now enduring is not insignificant, it is by far the lesser of the two evils which might arise.

It is therefore the conclusion of the court that it is without jurisdiction to grant the confirmation of the arbitration award which plaintiff requests. Plaintiffs' motion is denied, although the court retains jurisdiction of Civil Action No. 74-659 and the stay of that action, ordered by the court on July 16, 1974, remains in effect pending further proceedings in connection with the arbitration between the parties.

AND IT IS SO ORDERED.

/s/ Robert W. Hemphill
ROBERT W. HEMPHILL
United States District Judge

Charleston, South Carolina
March 10, 1976.

TRUE COPY
Test:
MILLER C. FOSTER, JR. Clerk

/s/ _____
Deputy Clerk

No. 82-1104

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GA TECHNOLOGIES INC. AND
GENERAL ATOMIC COMPANY,

Petitioners,

v.

UNITED NUCLEAR CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Mexico

BRIEF FOR RESPONDENT IN OPPOSITION

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February 4, 1983

QUESTIONS PRESENTED

1. Whether the judgment vacating the arbitration awards violated the opinions and mandates of this Court in *General Atomic Co. v. Felter*, 434 U.S. 12 (1977), and *General Atomic Co. v. Felter*, 436 U.S. 493 (1978), and whether the Court should reach that issue in view of a holding below that the petitioners' arguments were concluded by the New Mexico doctrines of *res judicata* and law of the case.

2. Whether the court below went beyond the scope of judicial review of an arbitration award under § 10 of the Federal Arbitration Act in holding that the arbitrators exceeded their powers and jurisdiction in proceeding to arbitration despite final New Mexico judgments which had determined that petitioner had waived any right to arbitrate, that all issues were inarbitrable antitrust issues or inextricably entwined therewith, and that the entire agreement between the parties including its arbitration clause was null, void, unenforceable and of no effect whatever.

3. Whether § 10 of the Federal Arbitration Act deprived the New Mexico courts of venue to review the arbitration awards.

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On Petition for a Writ of Certiorari to the Supreme Court of New Mexico

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent United Nuclear Corporation (UNC) [1] respectfully requests that the petition for writ of certiorari be denied.

STATUTORY PROVISIONS INVOLVED

The Federal Arbitration Act, 9 U.S.C. §§ 1-14 (1976), is reproduced in the Appendix hereto.

[1] United Nuclear Corporation is a subsidiary of UNC Resources, Inc., and it has no subsidiaries or affiliates within the meaning of Rule 28.1.

STATEMENT OF THE CASE

General Atomic Company (GAC)[2] seeks review of a decision of the Supreme Court of New Mexico which affirmed a trial court judgment vacating, pursuant to § 10 of the Federal Arbitration Act, 9 U.S.C. § 10, certain arbitration awards concerning a dispute between the parties over a uranium supply agreement (the 1973 Supply Agreement). The courts below held that the arbitrators exceeded their powers and jurisdiction when they proceeded to arbitrate the dispute despite prior final judgments by the New Mexico courts establishing that (1) GAC had waived any right to arbitrate, (2) in any event no issues were arbitrable, and (3) the entire 1973 Supply Agreement, of which the arbitration clause was a part, was "null, void, unenforceable and of no effect whatever." This Court has considered and denied previous petitions by GAC for review of those judgments, despite repeated arguments by GAC — resurrected here — that the New Mexico court in exercising jurisdiction to make decisions adverse to the merits of GAC's arbitration claims violated the opinions and mandates of this Court in *General Atomic Co. v. Felter*, 434 U.S. 12 (1977) (*"Felter I"*) and *General Atomic Co. v. Felter*, 436 U.S. 493 (1978) (*"Felter II"*).

While the issues now presented are relatively simple, GAC's latest petition culminates a long history of litigation — in the New Mexico courts and in other courts, including numerous resorts by GAC to this Court — which places those issues in a different light from that which appears from GAC's truncated statement of the case. We believe that the following restatement of the case will assist the Court by rectifying omissions in GAC's description of the factual background as well as in rebutting certain of GAC's characterizations of the facts and

[2] GAC and GA Technologies Inc., a newly-formed corporation that was not a party below, have filed a motion to substitute GA Technologies Inc. for GAC as petitioner. UNC has opposed that motion, which is pending. Throughout this brief we shall treat GAC as the petitioner.

representations as to the need for review by this Court. As we shall demonstrate, the decision below is correct, there is no conflict of decisions, and there is no issue which has not been but should be reviewed by this Court.

A. The New Mexico Litigation

1. Initiation of the New Mexico Litigation and GAC's Decision to Litigate Rather Than Arbitrate.

In 1975, UNC sued GAC in the Santa Fe, New Mexico, trial court. The complaint alleged that a uranium supply contract (the 1973 Supply Agreement) was void for several reasons, including GAC's violations of the New Mexico Antitrust Act. Although the agreement contained an arbitration clause, at no time during the nine months of active litigation preceding April 2, 1976, did GAC give UNC or any court notice of an election to arbitrate rather than litigate its 1973 Supply Agreement disputes. [3]

2. The April 2, 1976 Injunction and the Felter I Decision.

On April 2, 1976, the New Mexico trial court issued a preliminary injunction restraining GAC "from filing or prosecuting any other action or actions against United Nuclear Corporation in any other forum relating to any rights, claims or the subject matter of this action," including "the institution or

[3] GAC states that "[i]n March 1976, before an answer to the complaint had to be filed, GAC formally expressed its intention to arbitrate with UNC pursuant to this provision [the arbitration clause of the 1973 Supply Agreement]." Pet. 4. No record citation is given for this incorrect assertion. In a judgment which, as affirmed, this Court declined to review, the trial court found that GAC did not "in any way manifest its intention or desire to arbitrate rather than litigate" prior to November 29, 1977. See p. 6 *infra*.

prosecution of * * * arbitration * * *."[4] On its face, that injunction limited only what the parties might do "in any other forum"; it did not limit what they might do in the trial court. As that court found in its December 27, 1977 decision (see pp. 6-7 *infra*), the injunction "did not prohibit GAC from demanding arbitration with UNC in this forum." (Ex. 11,[5] Finding 13. See also Pet. App. 3a.)

In *Felter I*, this Court granted GAC's petition for a writ of certiorari and reversed a decision by the New Mexico Supreme court upholding the April 2, 1976 injunction. Specifically, this Court held that the Supremacy Clause as construed in *Donovan v. Dallas*, 377 U.S. 408 (1964), prohibits a state court from enjoining a party from initiating subsequent *in personam* actions in federal forums or invoking federal rights. See 434 U.S. at 15-19. The case was remanded "for further proceedings not inconsistent with this opinion." 434 U.S. at 19.

3. GAC's Failure to Seek Arbitration After April 2, 1976.

GAC did not request the trial court to stay its proceedings pending either arbitration or review of the April 2, 1976 injunction; rather, it continued to litigate in the New Mexico courts for more than 19 months before demanding arbitration under the 1973 Supply Agreement and moving for a stay of court proceedings pending such arbitration.

On May 5, 1976, GAC filed its answer to the complaint and counter-claimed against UNC. The eighth defense of the answer

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[4] The full language of the injunction is quoted in *Felter I*, 434 U.S. at 14 n.4.

[5] Two principal sets of exhibits were filed by UNC in the proceeding below. Citations in the form "Ex. .... " are to the set of 71 exhibits that had also been filed in the Southern District of California (see pp. 11-12 *infra*); citations in the form "12/23/80 Ex. .... " are to the set of 79 exhibits filed on December 23, 1980.

(Ex. 4, pp. 22-23) included allegations that "some" unspecified "issues in this case are subject to arbitration pursuant to Article XVII" of the 1973 Supply Agreement; that certain utility companies had demanded arbitration under their contracts with GAC and that UNC's "obligations to General Atomic may be affected" by those utility arbitration proceedings. GAC went on in its eighth defense to state that it "demands arbitration" of "only" those issues which GAC might ultimately be required to arbitrate with the utility companies,[6] but added:

> "Specifically excluded from the scope of this arbitration demand are all other arbitrable issues, including any concerning the validity and enforceability of the 1973 Uranium Supply Agreement."

GAC thus renounced any intention to arbitrate under the 1973 Supply Agreement. Moreover, GAC's election to litigate, rather than arbitrate, the issues relating to the 1973 Supply Agreement was confirmed by its counterclaim, which requested the court to specifically enforce that Agreement and award actual and punitive damages for its breach without any reference to arbitration. (Ex. 11, Finding 9.)

During the period between the filing of its answer and counterclaim and November 1977, GAC engaged in extensive pretrial discovery and other pretrial proceedings. GAC drafted the portion of a pretrial order, entered on August 22, 1977, setting forth its claims against UNC, without referring to a claim or demand for arbitration. In September 1977, after its discovery was completed, GAC moved for summary judgment on UNC's claims. The motion was denied on October 27, 1977. GAC repeatedly sought and obtained extensions of time and discovery

[6] By thus demanding arbitration with UNC in regard to issues to be arbitrated with the utilities under those separate contracts, GAC made unmistakably clear that it did not regard the April 2, 1976 injunction as preventing it from demanding arbitration with UNC.

orders from the trial court for the purpose of preparing for trial. It repeatedly invoked the appellate jurisdiction of the New Mexico courts on rulings not to its liking. See Ex. 11, Findings 15-21. But, as the trial court later found:

> "At no point between the commencement of the first action, filed as Cause No. 50044 in District Court for Santa Fe County, New Mexico, and the filing of the pending Motion for Stay (a period of more than two years), did GAC file a demand for arbitration, petition any court for an order compelling arbitration, petition this court for a stay of proceedings pending arbitration, or in any way manifest its intention or desire to arbitrate rather than litigate the issues between the parties arising under the 1973 Supply Agreement." *Id.*, Finding 12.

4. The Judgments of the New Mexico Courts as to Arbitrability and the Felter II Decision.

On November 29, 1977 in San Diego, California, GAC filed with the American Arbitration Association (AAA) a demand to arbitrate the disputes concerning the validity and enforceability of the 1973 Supply Agreement, and on November 30, 1977, GAC filed in the New Mexico trial court a motion for a stay of the proceedings in that court pending such arbitration pursuant to 9 U.S.C. § 3. At that time, the New Mexico case had been in trial for approximately a month. UNC resisted GAC's motion and filed a countermotion for an order enjoining arbitration.

On December 16, 1977, the trial court entered a partial final judgment enjoining arbitration (Ex. 9) and, on December 27, 1977, entered a partial final judgment denying a stay pending arbitration (Ex. 12). On the basis of extensive findings that have been cited throughout this statement, the trial court concluded, *inter alia*, that "GAC has waived any rights to demand

arbitration from UNC and has been in default in exercising these purported rights"; that "[t]he issues arising under the New Mexico Antitrust Laws * * * may not be submitted to arbitration"; and that "[a]ll issues in this case are so intertwined with issues arising under the New Mexico Antitrust Laws that none of the issues can properly be submitted to arbitration." (Ex. 11, Conclusions 2, 7 and 8.)

GAC petitioned this Court for a writ of mandamus to set aside *both* the December 16 and the December 27, 1977 judgments on the ground that they violated this Court's decision and mandate in *Felter I*. On May 30, 1978, this Court issued its *Felter II* opinion granting GAC's petition insofar as it is requested that the December 16, 1977 judgment be vacated. The Court concluded that the December 16 judgment violated the decision and mandate in *Felter I*, which "held that [the trial court] lacked the power to * * * interfere with attempts by GAC to assert in federal forums what it views as its entitlement to arbitration." 436 U.S. at 496. However, this Court expressly denied GAC's petition insofar as it also sought vacation of the December 27, 1977 judgment denying GAC's request for a stay pending arbitration. As this Court explained, that judgment did not prevent "GAC from pursuing its arbitration claims in other forums" (436 U.S. at 498 n.2), and:

> "Clearly, our prior opinion did not preclude the [trial] court from making findings concerning whether GAC had waived any right to arbitrate or whether such a right was contained in the relevant agreements. Nor did our prior decision prevent the Santa Fe court, on the basis of such findings, from declining to stay its own trial proceedings as requested by GAC pending arbitration in other forums." 436 U.S. at 496-97.

The New Mexico Supreme Court then invited the parties to submit their views as to the effect of *Felter II* upon the pending

appeal from the December 27, 1977 judgment. (12/23/80 Ex. 10, pp. 29-30.) GAC urged that all of the trial court's actions and judgments after April 2, 1976, violated the mandates of the *Felter* decisions and thus were void and *coram non judice*. (12/23/80 Exs. 15, 17.) But on May 7, 1979, the New Mexico Supreme Court affirmed the December 27, 1977 judgment in all respects. *United Nuclear Corp. v. General Atomic Co.*, 93 N.M. 105, 597 P.2d 290.[7] GAC's petition for writ of certiorari was denied. 444 U.S. 911 (1979) (No. 79-190).

5. The Default Judgment Against GAC.

After GAC's motion for a stay pending arbitration was denied, the trial proceeded. On March 27, 1978, the trial court entered a sanctions order and default judgment in favor of UNC on its claims against GAC, excepting damages, and struck GAC's defenses and counterclaims (Ex. 18). The factual basis for imposing sanctions was set forth in 44 recitals which detailed GAC's discovery failures. Among other things:

> "Based on all facts, the Court is forced to conclude * * * that GAC has followed a consistent pattern and practice of concealing, rather than revealing, highly relevant documents to the Court and to the parties here, and that

[7] Among other things, the New Mexico Supreme Court held: (1) the trial court had the jurisdiction and duty, under Section 3 of the Federal Arbitration Act, to determine whether GAC had waived its right to demand arbitration by litigation conduct amounting to a default in proceeding with arbitration (597 P.2d at 299); (2) the April 2, 1976 injunction never prohibited GAC from moving the trial court for a stay pending arbitration or from otherwise asserting in that court a demand for arbitration (*id.* at 303-05); (3) the record supported the trial court's findings of fact and conclusion that GAC had waived any right to arbitrate (*id.* at 295-307, 313); (4) in any event, the New Mexico antitrust issues were not arbitrable and all other issues were so intertwined with and permeated by those antitrust issues that they too were not arbitrable (*id.* at 309-13); and (5) the trial court's denial of GAC's motion for a stay pending arbitration was not in violation of or inconsistent with the *Felter* decisions (*id.* at 309).

such actions and practices have been contumacious, intentional, willful, deliberate and, in the utmost bad faith." *Id.*, Recital 24.

On April 4, 1978, the trial court entered a judgment declaring that the 1973 Supply Agreement violated the New Mexico Antitrust Act and thus "is null, void, unenforceable and of no effect whatever" and that "performance thereunder is excused" (Ex. 19, ¶A). On August 29, 1980, the New Mexico Supreme Court affirmed the trial court in all material respects. *United Nuclear Corp. v. General Atomic Co.*, 96 N.M. 155, 629 P.2d 231.

GAC appealed to this Court seeking review not only of the New Mexico Supreme Court's August 29, 1980 decision but also of that court's May 7, 1979 arbitrability decision, insofar as it had rejected GAC's arguments that the *Felter* decisions had been violated. This Court dismissed GAC's appeal for want of jurisdiction and denied certiorari. *General Atomic Co. v. United Nuclear Corp.*, 451 U.S. 901, *rehearing denied*, 452 U.S. 932 (1981) (No. 80-1360). Thus, the judgments affirmed by the May 7, 1979 and August 29, 1980 decisions of the New Mexico Supreme Court have been final for all purposes for more than two years.

B. The Arbitration Proceedings and UNC's Efforts to Halt Them.

Arbitration of the 1973 Supply Agreement disputes was never ordered by any court, and GAC never petitioned any court for such an order pursuant to 9 U.S.C. § 4. After GAC's demand for arbitration on November 29, 1977, the AAA assured UNC that it would hold the arbitration proceedings in abeyance "pending final resolution of its arbitrability by the appropriate court" (Ex. 17). Notwithstanding that undertaking and repeated

objections by UNC that arbitration would be inappropriate and illegal while the New Mexico judgments of December 27, 1977, and April 4, 1978, remained in effect (Ex. 23, 25, 27), on July 26, 1978 (two months after the *Felter II* decision and while the arbitrability issue and the default judgment were pending on GAC's appeals to the New Mexico Supreme Court), the AAA notified UNC that it would proceed and directed UNC to appoint its arbitrator (Ex. 31).[8]

UNC designated an arbitrator under protest, protested the jurisdiction of the arbitrators, and reiterated that protest verbally and in writing at every juncture. (Exs. 33, 36, 38, 40; Ex. 43, pp. 347-50.) UNC was assured by GAC that "GAC will not claim that UNC's assertions, discussion, and trying of its claims, under protest, constitute waiver or abandonment of its position on *res judicata* and full faith and credit" (Ex. 41). When the arbitrators scheduled a preliminary hearing in San Diego in March 1979, UNC appeared under protest for the sole purpose of objecting to jurisdiction, and when the arbitrators decided to hold hearings on nonjurisdictional issues, UNC immediately withdrew from the proceeding (Ex. 43).[9]

On November 14, 1979, a majority of the arbitration panel issued a "Partial Award" concluding that the New Mexico proceedings were "coram non judice" and that, accordingly, the

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[8] On July 31, 1978, UNC filed suit against the AAA in the United States District Court for the District of New Mexico, arguing that the New Mexico judgments precluded arbitration. In decisions dated September 27 and October 26, 1978 (Pet. App. 152a and Ex. 35), Judge Bratton for that court dismissed the complaint for lack of subject matter jurisdiction.

[9] Following the decision of the arbitrators to hear the nonjurisdictional issues, UNC filed suit in the United States District Court for the Southern District of California against GAC, the AAA and the arbitrators to enjoin the continuation of arbitration, but that suit was dismissed for lack of subject matter jurisdiction, as was a subsequent suit by UNC against Gulf Oil Corporation, one of GAC's consitituent partners. (Exs. 46, 51; Pet. App. 160a.)

New Mexico judgments "are not res judicata and they are not entitled to full faith and credit." (Pet. App. 37a, 59a.) They also concluded that GAC had not waived its arbitration rights. (*Id.* 60a-66a.) On June 13, 1980, UNC's counsel wrote to the AAA reaffirming that UNC "has not participated in the arbitration except in efforts, undertaken under protest, to procure its dismissal and it will not participate in the arbitration or hearings or proceedings therein * * *" (Ex. 58). Without the presence of either UNC or a UNC-designated arbitrator, the two remaining arbitrators proceeded with hearings and, on September 10, 1980, issued a "Final Award" (Pet. App. 92a). In that award, the two arbitrators accepted GAC's *ex parte* case of contract breach, purported to pass upon UNC's antitrust claims and concluded that there was no showing of an antitrust violation, awarded damages to GAC in the amount of $301,181,635, and ordered UNC to specifically perform certain provisions of the 1973 Supply Agreement amounting to delivery of over 15 million pounds of uranium concentrates to GAC.

C. Proceedings to Review the Arbitration Awards.

On June 9, 1980, UNC filed a First Petition for Supplemental Relief in the New Mexico trial court seeking to vacate the partial award. On September 15, 1980, UNC filed a Second Petition for Supplemental Relief and Application to Vacate Arbitration Award, which requested vacation of the final award pursuant to 9 U.S.C. § 10 and incorporated by reference the First Petition for Supplemental Relief. Shortly thereafter, GAC removed those proceedings to the United States District Court for the District of New Mexico.

On September 12, 1980, GAC filed an application in the United States District Court for the Southern District of California to confirm the Final Award. On October 24, 1980, Judge Enright for that court dismissed that application on the

ground that the Federal Arbitration Act did not provide an independent basis for federal jurisdiction. That decision was affirmed, *General Atomic Co. v. United Nuclear Corp.*, 655 F.2d 968 (9th Cir. 1981), and this Court denied GAC's petition for writ of certiorari on February 22, 1982. 455 U.S. 948, *rehearing denied*, 102 S.Ct. 1449 (No. 81-1221).

On the same day that its confirmation action was dismissed by the Southern District of California, GAC filed an application to confirm the arbitration awards, under 9 U.S.C. § 9, in the Superior Court of the State of California for the County of San Diego. UNC, appearing specially, moved to dismiss the proceeding for lack of *in personam* jurisdiction. After the trial court denied that motion, UNC petitioned the California Court of Appeal for a peremptory writ of mandate. On December 16, 1980, that court filed its opinion and judgment letting "a peremptory writ of mandate issue * * * directing the superior court to dismiss [that] action." *United Nuclear Corp. v. Superior Court*, 113 Cal. App. 3d 359, 169 Cal. Rptr. 827. Among other things, the Court of Appeal rejected GAC's argument that personal jurisdiction could be based upon the arbitration clause in the 1973 Supply Agreement, since the decisions of the New Mexico courts holding that agreement to be void "are entitled to full faith and credit," and concluded that the record did not otherwise "reveal a sufficient basis to establish personal jurisdiction" over UNC. The California Supreme Court denied GAC's petition for hearing on February 18, 1981. This Court denied GAC's petition for writ of certiorari on October 5, 1981. *General Atomic Co. v. United Nuclear Corp.*, 454 U.S. 878, *rehearing denied*, 454 U.S. 1093 (No. 80-2106).

In the meantime, the United States District Court for the District of New Mexico had, on December 11, 1980, granted UNC's motion to remand the New Mexico proceedings seeking vacation of the arbitration awards on the ground that the Federal

Arbitration Act did not provide an independent basis for federal jurisdiction. (12/23/80 Ex. 77, 78.) Following the remand, Judge Musgrove for the New Mexico trial court, on January 9, 1981, issued an opinion, decision and judgment vacating the arbitration awards (Pet. App. 20a-35a). Among other things, the court concluded that it had jurisdiction to review the arbitration awards under § 10 of the Federal Arbitration Act (Pet. App. 20a-21a, 33a), and that the arbitrators had exceeded their jurisdiction and powers and acted in manifest disregard of the law (*id.* 32a). In so ruling, Judge Musgrove relied upon the prior judgments upheld in the May 7, 1979 and August 29, 1980 decisions of the New Mexico Supreme Court, as to which this Court had denied review, holding those judgments to be the law of the case and *res judicata* on the issues decided therein (*id.* 24a-27a, 32a).

GAC appealed to the New Mexico Supreme Court. At the same time, however, it petitioned this Court for a writ of mandamus to the trial court, alleging that the judgment vacating the arbitration awards violated this Court's mandates in *Felter I* and *Felter II*. This Court denied the petition on October 5, 1981. *In re General Atomic Co.*, 454 U.S. 811 (No. 80-2107).

On September 15, 1982, the New Mexico Supreme Court affirmed the judgment vacating the arbitration awards. (Pet. App. 1a-19a; 651 P.2d 1277.) Among other things, the court held that the judgment did not conflict with this Court's *Felter* decisions (Pet. App. 10a-11a); that GAC's arguments to the contrary were barred under New Mexico law by *res judicata* and law of the case (*id.* 12a-13a); that the Federal Arbitration Act did not deprive the New Mexico courts of jurisdiction or venue to review the arbitration awards (*id.* 14a-16a); and that the trial court had properly concluded that "the arbitrators had no jurisdiction to issue an award," but rather had "acted in manifest disregard of the law and in excess of their powers" in disregarding the New Mexico judgments that established both inarbitrability and the invalidity of the 1973 Supply Agreement (*id.* 17a-18a). Rehearing was denied on October 4, 1982.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Federal Arbitration Act provides that disputes over arbitrability may be judicially determined prior to arbitration on a motion to stay litigation concerning the underlying agreement or on a motion to compel arbitration if such litigation has not been instituted. On a motion by GAC to stay litigation of the contractual dispute underlying this case, the New Mexico courts determined that GAC had waived arbitration through litigation conduct inconsistent therewith and that, in any event, since the underlying dispute consisted of antitrust issues and issues inextricably entwined therewith, no issues were arbitrable. Federal court decisions unanimously hold that those determinations are for a court — rather than an arbitrator — to make, and this Court denied review of the New Mexico decision. The New Mexico courts proceeded with the litigation and entered a judgment holding the underlying agreement including its arbitration clause to be null and void, and this Court also refused to review that decision. Federal court decisions unanimously hold that a dispute which has been decided in litigation cannot be arbitrated. Nonetheless, an arbitration panel made its own determination of the waiver issue and undertook to arbitrate the underlying dispute — including the antitrust issues — in lawless disregard of the procedures established by the Federal Arbitration Act and the decisions of the New Mexico courts.

GAC's contentions to the effect that this Court's *Felter* decisions determined that GAC had a right to arbitrate and that the New Mexico courts have no jurisdiction to rule to the contrary have repeatedly been made and rejected in prior proceedings. This Court made entirely clear in *Felter II* that, while the New Mexico courts could not enjoin or restrict GAC from attempting to assert its arbitration claims in other forums,

the New Mexico courts could make determinations as to waiver and arbitrability and thus proceed with the litigation before them. GAC's contrary contentions have been rejected by both the New Mexico and California courts in final decisions which this Court refused to review. Those decisions were held by the court below to be binding under New Mexico doctrines of *res judicata* and law of the case, thus providing an independent basis in state law which is not reviewable here. In any event, GAC's contentions have no merit. The judgment vacating the arbitration awards does not restrict GAC from attempting to assert its arbitration claims in other forums, but simply determines the merits of issues properly before the New Mexico courts on judicial review of the arbitration awards.

Section 10(d) of the Federal Arbitration Act expressly authorizes a court to vacate an arbitration award "[w]here the arbitrators exceeded their powers." The arbitrators clearly exceeded their powers and jurisdiction by purporting to arbitrate a dispute which has been judicially determined in final litigation between the parties to be inarbitrable and which has been finally disposed of in such litigation. The venue provision in § 10(a) of the Federal Arbitration Act is expressly limited to the venue of "United States court[s]" and does not deprive the New Mexico courts of venue of this review proceeding. The rulings of the New Mexico courts so holding do not conflict with decisions of any other court, and GAC's arguments do not raise any issue which should be decided by this Court.

ARGUMENT

I. The Opinions and Mandates of the Felter Decisions Did Not Preclude the New Mexico Courts from Reviewing the Arbitration Awards.

GAC attempts once again (Pet. 12-15) to persuade this Court that its *Felter* decisions deprived the New Mexico courts of

jurisdiction to take any action adverse to GAC's arbitration claims, rather than simply precluding those courts from enjoining attempts by GAC to assert such claims in federal forums. There never was any substance to that argument; it was squarely rejected by this Court in *Felter II;* and this Court repeatedly has refused to review subsequent repetitions by GAC of that argument. If possible, there is even less reason for review on this occasion as the decision below was independently grounded upon the New Mexico law of *res judicata,* and thus upon state law that is not reviewable by this Court.

In *Felter I,* a preliminary injunction had restrained both GAC and UNC from "filing or prosecuting any other action or actions * * * in any other forum relating to * * * the subject matter of this action," including "arbitration proceedings * * *." 434 U.S. at 14 n.4. While holding that the injunction violated the Supremacy Clause insofar as it enjoined the parties from proceeding in federal forums, this Court neither held nor suggested that GAC had a right to arbitrate or that the New Mexico courts lacked jurisdiction to proceed with the litigation. Rather, the Court applied the doctrine of *Donovan v. Dallas,* 377 U.S. 408 (1964), which invoked "a general rule * * * that state and federal courts would not interfere with or try to restrain each other's proceedings." 377 U.S. at 412. Thus, "where the judgment sought is strictly in personam, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other," quoting *Princess Lida v. Thompson,* 305 U.S. 456, 466 (1930).[10] *Ibid.* And, this Court remanded "for further proceedings not inconsistent with this opinion." 434 U.S. at 19.

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[10]GAC's argument (Pet. 14-15) that *Donovan* held that only the federal forum could decide a claim of *res judicata* is mistaken. The reference in the sentence quoted by GAC to a decision by a federal court of such a claim merely reflects the fact that in *Donovan* the first court to enter a judgment was the state

Accordingly, GAC had no basis to complain about the New Mexico court's exercise of jurisdiction prior to the filing of a timely motion for a stay of proceedings pursuant to § 3 of the Federal Arbitration Act (9 U.S.C. § 3).[11] When GAC finally filed such a motion after almost two years of intensive litigation (see pp. 3-6 *supra*), the trial court found that GAC had waived arbitration by its inconsistent litigation activities and that, in any event, all issues were inarbitrable antitrust issues or inextricably entwined therewith, and entered two partial final judgments: one enjoining arbitration and the other denying a stay of the litigation pending arbitration. See pp. 6-7 *supra*. GAC's mandamus petition in *Felter II* contended that *both* judgments violated *Felter I*. While this Court granted that petition as to the judgment staying arbitration, since it "interfere[d] with attempts by GAC to assert in federal forums what it views as its entitlement to arbitration," 436 U.S. at 496, this Court denied that petition as to the judgment denying a stay of litigation pending arbitration since that judgment did not "restrict[] GAC from pursuing its arbitration claims in other forums." 436 U.S. at 498 n.2. "Clearly, our [*Felter I*] opinion did not preclude the court from making findings concerning whether GAC had waived any right to arbitrate or whether such a right was contained in the relevant agreements. Nor did our prior decisions prevent the Santa Fe court, on the basis of such findings, from declining to stay its own proceedings as requested by GAC pending arbitration in other forums." 436 U.S. at 496-97.

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court, so that the federal suit happened to be the "second suit" in which the *res judicata* plea normally would be raised. See 377 U.S. at 412. And, of course, nothing in *Donovan* purports to hold that a court reviewing an arbitration award cannot decide *res judicata* issues.

[11] A "court has jurisdiction to litigate a contract, despite * * * an arbitration clause," and the "remedy of the party claiming [arbitration] * * * is a stay of proceedings until it has been had or a default in pursuing the arbitration is shown, 9 U.S.C.A. § 3 * * *." *William S. Gray & Co. vs. Western Borax Co.*, 99 F.2d 239, 240 (9th Cir. 1938). See, *e.g.*, *The Anaconda v. Am. Sugar Refining Co.*, 322 U.S. 42, 44 (1944); *Demsey & Associates v. S.S. Sea Star*, 461 F.2d 1009, 1017 (2d Cir. 1972); *United Electrical, R. & M. Workers v. Oliver Corp.*, 205 F.2d 376, 385 (8th Cir. 1953).

So, too, the judgment vacating the arbitration awards does not enjoin or restrict GAC from attempting "to assert in federal forums what it views as its entitlement to arbitration" or its views as to the validity of the arbitration awards. Indeed, GAC has done so (although unsuccessfully) without let or hindrance from the New Mexico courts. See pp. 11-13 *supra*. It is equally clear that the *Felter* opinions did not preclude the New Mexico courts from making findings concerning the validity of the arbitration awards or from vacating those awards on the basis of such findings. *Felter II* establishes beyond question that the New Mexico courts retained jurisdiction to make decisions adverse to the merits of GAC's arbitration claims and thus to proceed with the litigation, as the court below recognized. (Pet. App. 10a-11a.)

Moreover, when the New Mexico Supreme Court affirmed the partial final judgment denying a stay of litigation pending arbitration, it rejected arguments by GAC that this denial on the merits of GAC's claimed right to arbitration was inconsistent with the *Felter* cases. GAC's petition for writ of certiorari, which renewed those arguments, was denied. [12] See pp. 7-8 *supra*. GAC reiterated those arguments in its appeal from the New Mexico judgment holding the 1973 Supply Agreement to be "null, void, unenforceable and of no effect whatever," but this Court dismissed the appeal for want of jurisdiction and denied certiorari. [13] See pp. 8-9 *supra*. GAC again restated its *Felter* arguments in proceedings arising from its application to a California state court for confirmation of the arbitration award, including its petition for writ of certiorari from the dismissal of

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[12] See Pet. in No. 79-190 at 24-33, 36-38, and compare Brief for Respondent United Nuclear Corporation in Opposition in No. 79-190 at 22-24 and 31 n.29.

[13] See Juris. Stmt. in No. 80-1360 at 23-25, and compare Motion of United Nuclear Corporation to Dismiss or Affirm in No. 80-1360 at 22-25.

that proceeding, and this Court again denied certiorari.[14] See p. 12 *supra*. And, when the New Mexico trial court entered its judgment vacating the arbitration awards — the judgment which, as affirmed by the New Mexico Supreme Court, GAC now seeks to have reviewed — GAC petitioned this Court for a writ of mandamus contending, as it does now, that the *Felter* decisions had been violated.[15] Once again, this Court denied the petition. See p. 13 *supra*.

In short, as stated by the New Mexico Supreme Court in the opinion now sought to be reviewed (Pet. App. 12a):

> "If ever a court decision were etched in bronze, it would be the one holding that *Felter I* and *Felter II* did not prevent our state courts from deciding all the material issues in this case. *United Nuclear Corp. v. General Atomic Co.*, (our 1979 opinion), *supra* [93 N.M. 105, 597 P.2d 290]. Like a yo-yo, this question has been propelled to and fro innumerable times between lower courts and the United States Supreme Court. Each time the result has been a rejection of GAC's claims. If the doctrines of *res judicata* and the law of the case still have efficacy under our law, this issue has been adequately set at rest."

Of course, the court below concluded that the doctrines of *res judicata* and law of the case do still have efficacy under New

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[14] The California Court of Appeal, in directing dismissal of GAC's confirmation petition for lack of *in personam* jurisdiction, held that such jurisdiction could not be conferred by the arbitration clause in the 1973 Supply Agreement because of the *res judicata* effect of the New Mexico judgments. GAC contended that the California court thereby "failed to implement" this Court's *Felter* decisions "and compounded the New Mexico courts' prior violations of the Supremacy Clause" as interpreted in the *Felter* decisions. Pet. in No. 80-2106 at 23. See, generally, *id.* at 23-26, and compare Brief for Respondent in Opposition in No. 80-2106 at 15-19.

[15] See Pet. in No. 80-2107 at 8-14, and compare Brief for Respondent United Nuclear Corporation in Opposition in No. 80-2107 at 12-17.

Mexico law and thus that GAC's arguments based on the *Felter* decisions were foreclosed by each of those state-law doctrines (Pet. App. 12a-13a) as well as being erroneous (Pet. App. 10a-11a).

Since that *res judicata* ruling provided an independent state-law basis for rejecting GAC's *Felter* arguments, those arguments are not reviewable by this Court regardless of their merits. *Postal Telegraph Cable Co. v. Newport*, 247 U.S. 464, 475 (1918); *Northern Pacific Railroad Co. v. Ellis*, 144 U.S. 458, 464-65 (1892); *San Francisco v. Itsell*, 133 U.S. 65 (1890).[16] Moreover, the foregoing recital demonstrates that those arguments are meritless. In view of this Court's grant of an extraordinary writ in *Felter II* to correct a violation by the New Mexico trial court of this Court's mandate in *Felter I*, it is hardly conceivable that, on three occasions, this Court would have denied direct review of appellate judgments upholding decisions adverse to GAC's arbitration claims, and in addition denied review on a mandamus petition of the very trial court judgment which as affirmed on appeal is in issue here, if this Court perceived any merit in GAC's interpretation of the *Felter* decisions.[17] This Court should reject once again GAC's attempt to obtain review of that issue.

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[16] While it is immaterial in view of the *res judicata* holding, we believe that nonreviewability also results from the New Mexico Supreme Court's law-of-the-case holding. Under New Mexico law, law of the case is not a discretionary doctrine, but is akin to *res judicata* in that it prevents "the legal question so resolved" in an earlier appeal from "being determined in a different manner on a subsequent appeal" even if "the first ruling was in error." Pet. App. 13a and cases there cited. *Cf. Northern Pacific Railroad Co. v. Ellis, supra*; compare *Southern Ry. Co. v. Clift*, 260 U.S. 316, 319-20 (1922).

[17] In opposing that mandamus petition, UNC conceded that the writ should issue if the trial court's vacation of the arbitration awards violated the *Felter* mandates, but went on to demonstrate that no such violation occurred. See Brief for Respondent United Nuclear Corporation in Opposition in No. 80-2107 at 11-12.

II. The New Mexico Courts Properly Applied Section 10 of the Federal Arbitration Act in Vacating Arbitration Awards Which the Arbitrators Had No Power to Make.

There is no substance whatever in GAC's contention (Pet. 15-19) that the New Mexico courts misapplied Section 10 of the Federal Arbitration Act in vacating the arbitration awards. GAC's arguments would turn the Act on its head by permitting arbitrators to override judicial determinations as to arbitrability, without any effective judicial review. That cannot rationally be and is not the law.

In enacting the Federal Arbitration Act, "the purpose of the Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint v. Flood & Conklin,* 388 U.S. 395, 404 n.12 (1967). Thus, the existence of a written arbitration agreement in maritime, interstate or foreign commerce is essential to arbitration under §§ 1 and 2 of the Act (9 U.S.C. §§ 1 and 2). That "threshold" issue is for the courts to decide, *Bernhardt v. Polygraphic Co.,* 350 U.S. 198, 200-02 (1956); the courts, not arbitrators, determine if "the parties are subject to an agreement to arbitrate * * *." *Operating Engineers v. Flair Builders, Inc.,* 406 U.S. 487, 491 (1972). If the underlying contractual dispute already is being litigated, arbitrability issues are determined pursuant to a motion under § 3 (9 U.S.C. § 3) to stay the litigation pending arbitration, and if no litigation is pending, the remedy is a judicial proceeding under § 4 (9 U.S.C. § 4) to compel arbitration. While GAC never filed a § 4 petition to compel arbitration, it did file a § 3 motion for a stay pending arbitration after intensively litigating in the New Mexico proceeding for almost two years. See pp. 3-6 *supra.*

Whether a party has waived its right to arbitrate through inconsistent actions in litigation is universally held to be "a

question for determination by the courts,"[18] and the courts also have determined without exception that antitrust issues (and issues inextricably entwined therewith) are not arbitrable under the Act.[19] The New Mexico courts, in denying GAC's § 3 motion for a stay pending arbitration, accordingly held that they had jurisdiction under the Act to determine those arbitrability issues and that the underlying dispute was inarbitrable both because GAC had waived arbitration and because all issues were antitrust issues or issues inextricably entwined therewith; and this Court denied review of those rulings. See pp. 6-8 *supra*. Those rulings not only accord with the decisions of other courts, but are binding upon the parties under the New Mexico doctrines of *res judicata* and law of the case as the court below held (Pet. App. 14a). And, of course, not being arbitrable, the underlying dispute continued to be justiciable. The New Mexico courts proceeded to determine that the entire 1973 Supply Agreement — including its arbitration clause — was "null, void, unenforceable and of no effect whatever," and this Court also refused to review that decision. See pp. 8-9 *supra*.[20] Hence, no arbitration agreement exists to support either the partial or the final arbitration award.

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[18] *N & D Fashions, Inc. v. DJH Industries, Inc.*, 548 F.2d 722, 728-29 (8th Cir. 1976). See also, *e.g.*, *Martin Marietta Aluminum, Inc. v. General Elec. Co.*, 586 F.2d 143, 146 (9th Cir. 1978); Brief for Respondent United Nuclear Corporation in Opposition in No. 79-190 at 33-37 and cases there cited.

[19] See, *e.g.*, *Applied Digital Tech., Inc. v. Continental Cas. Co.*, 576 F.2d 116, 117-19 (7th Cir. 1978), and other cases cited in Brief for Respondent United Nuclear Corporation in Opposition in No. 79-190 at 37-41; compare *Bos Material Handling, Inc. v. Crown Controls Corp.*, 137 Cal. App. 3d 99, 109-11 (1982).

[20] GAC's reliance on *Prima Paint v. Flood & Conklin*, 388 U.S. 395 (1967) (Pet. 16), is misplaced. *Prima Paint* holds that a claim of fraud in the inducement of the entire contract is for the arbitrator to decide where the dispute otherwise is arbitrable. *Prima Paint* did not involve a prior judicial determination that an applicant for a 9 U.S.C. § 3 stay of litigation had waived its right to arbitration or a situation in which the underlying agreement was alleged to be void by reason of inarbitrable antitrust issues. Thus, *Prima Paint* has no application to this case. Indeed, GAC did not even contend that *Prima*

This appears to be the first case in which arbitrators have proceeded to arbitrate in the face of a judicial determination that a dispute is not arbitrable. Such an unprecedented occurrence cannot be expected to recur, and thus the case does not have the general importance that might warrant review by this court. But however that may be, the Congress hardly could have intended to insulate from judicial review and correction arbitration awards that flout the Act's allocation of power between courts and arbitrators, and it did not do so. Rather, § 10(d) expressly provides for vacation of an arbitration award "[w]here the arbitrators exceeded their powers." 9 U.S.C. § 10(d).[21] The arbitrators here plainly "exceeded their powers" in presuming to decide that arbitration had not been waived (Pet. App. 60a-66a) to decide inarbitrable antitrust issues (Pet App. 109a-113a) as well as the other issues entwined therewith, and to issue an award purporting to enforce a contract which had been judicially determined to be of "no effect whatever."

Thus, the courts have consistently held that, on review of an arbitration award, "whether the arbitrator had jurisdiction over a particular dispute — *i.e.*, whether the controversy is arbitrable

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Paint prevented the New Mexico courts from rendering the sanctions judgment in requesting this Court to review that judgment (Juris. Stmt. in No. 80-1360). GAC did contend (erroneously) that the arbitrability rulings of the New Mexico courts conflicted with *Prima Paint* (Pet. in No. 79-190 at 38-40) in requesting this Court to review those rulings, but the Court denied review.

[21] In addition, some courts have recognized that an arbitration award may be vacated if the arbitrators acted in "manifest disregard" of the law or contrary to an established public policy. See, *e.g.*, *National R.R. Pass. Corp. v. Chesapeake & O. Ry.*, 551 F.2d 136, 143 (7th Cir. 1977); *Aerojet-General Corp. v. American Arbitration Ass'n*, 478 F.2d 248, 252 (9th Cir. 1973); and *Saxis Steamship Co. v. Multifacs International Traders, Inc.*, 375 F.2d 577, 582 (2d Cir. 1967), all of which are cited by GAC (Pet. 18); see also, *e.g.*, *Johns-Manville Sales v. Intern. Ass'n of Machinists*, 621 F.2d 756, 759 (5th Cir. 1980). While we agree with the court below that the instant awards also are vacatable under these standards (Pet. App. 17a, 32a), we see no need to pursue that matter further in view of the plain applicability of the express statutory standard for vacating an award when the arbitrators exceeded their powers.

— is a question for the court to decide." *Intern. Broth. of Team., Etc. v. W. Pa. Mo. Car.*, 574 F.2d 783, 787 (3d Cir.), *cert. denied*, 439 U.S. 828 (1978). "While the court may refer to an arbitrator's discussion on arbitrability in order to aid its determination, * * * it must make its own independent determination of this threshold issue" in reviewing an arbitration award. *Mobil Oil v. Local 8-766, Oil, Chemical & Atomic*, 600 F.2d 322, 325 (1st Cir. 1979). See also, *e.g., Davis v. Chevy Chase Financial Ltd.*, 667 F.2d 160, 166-67 (D.C. Cir. 1981). And, of course, where the underlying dispute has been decided in litigation "there [is] no controversy to arbitrate." *Fremont Cake & Meal Co. v. Wilson & Co.*, 183 F.2d 57, 59 (8th Cir. 1950). If "no arbitration agreement exists the arbitration award * * * is void," *Great American Trading v. I.C.P. Cocoa, Inc.*, 629 F.2d 1282, 1288 (7th Cir. 1980). Here, the 1973 Supply Agreement — including its arbitration clause — had been judicially determined to be "null, void, unenforceable and of no effect whatever." When the underlying dispute has been decided by a judgment that is *res judicata*, an arbitration award purporting to decide that dispute in a contrary manner will be vacated. *Telephone Workers Union v. N.J. Bell Tel.*, 584 F.2d 31 (3d Cir. 1978).

The fact that these issues going to the power or jurisdiction of the arbitrators were decided by the New Mexico courts prior to the arbitration awards obviously does not mean that those courts cannot vacate the awards, but rather provides an additional reason for doing so. The "res judicata or collateral estoppel effect of the prior determination is a question for the court, not for the arbitrator before whom the point is sought to be relitigated." *N.Y.S. Association for Retarded Children v. Carey*, 456 F. Supp. 85, 96 (E.D.N.Y. 1978). "This is so whether the question arises in an action to compel arbitration * * * or, as here, in an action to" review "a disputed award." *Telephone Workers Union v. N.J. Bell Tel., supra*, 584 F.2d at 33. See also *Clemens v. Central Railroad Company of New Jersey*, 399 F.2d 825 (3d Cir. 1968), *cert. denied*, 393 U.S. 1023 (1969); *Lummus*

Co. v. Commonwealth Oil Refining Co., 297 F.2d 80, 87 (2d Cir. 1961), *cert denied*, 368 U.S. 986 (1962); *Garlick Funeral Homes v. Local 100, Ser. Emp., Inc.*, 413 F. Supp. 130 (S.D.N.Y. 1976); *Ballard & Associates, Inc. v. Mangum*, 368 A.2d 548, 553 (D.C. 1977). [22]

There is no conflict of decisions, despite GAC's assertions to the contrary (Pet. 17-18). [23] The decision by the court below accords with the language of the Federal Arbitration Act, with other decisions under that Act, and with common sense, and does not raise an issue of general importance which this Court should review and decide.

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[22] GAC asserts that "two federal district judges also said in related litigation that the arbitrators had jurisdiction to decide [the *res judicata*] question." (Pet. 16-17.) GAC refers to statements made in the course of holdings that the federal courts did not have subject matter jurisdiction of suits to restrain arbitration (see Pet. 17 n.9 and p. 10 nn.8-9 *supra*.). GAC does not and could not claim that those courts held that the *res judicata* issues must be submitted to the arbitrators. Moreover, those courts neither held nor suggested that a court could not determine arbitrability issues, including *res judicata* issues relevant thereto, upon review of an arbitration award. Finally, UNC's limited participation under protest in the arbitration proceedings (see pp. 9-11 *supra*) did not waive its right to dispute the arbitrators' jurisdiction or the validity of the arbitration awards upon review thereof. *E.g., Davis v. Chevy Chase Financial Ltd., supra*, 667 F.2d at 167; *Local 719, American Bakery & C. Wkrs. v. National Biscuit Co.*, 378 F.2d 918, 921-22 (3d Cir. 1967).

[23] None of the cases cited by GAC for the proposition that the decision below "conflicts with numerous decisions by the federal courts that strictly limit judical review of arbitration awards" (Pet. 18) either decided or suggested that arbitrability issues going to the jurisdiction of the arbitrators, including relevant *res judicata* contentions, are not for the courts to decide. Furthermore, while the district court in *Boston and Maine Corp. v. Illinois Central Railroad Co.*, 396 F.2d 425 (2d Cir. 1968), indicated that it was precluded from reviewing the merits of an arbitrator's rejection of a claim of *res judicata*, in fact that court went on to determine "that neither the defense of *res judicata* nor the related doctrine of collateral estoppel is available to the defendant" since the "decision of the State court relied upon was a denial of summary judgment, not a final decision on the merits." 274 F. Supp. 257, 260-61 (S.D.N.Y. 1967). Insofar as appears from the opinion of the Second Circuit, that issue was not involved in the appeal. *Refino v. Feuer Transp., Inc.*, 480 F. Supp. 562 (S.D.N.Y. 1979), *aff'd without opinion*, 633 F.2d 205 (2d Cir. 1980), involved the effect to be

III. Section 10 of the Federal Arbitration Act Did Not Deprive the New Mexico Courts of Venue.

Section 9 of the Federal Arbitration Act provides that "[i]f no court is specified in the agreement of the parties, then such application [to confirm the award] may be made to the United States court in and for the district within which such award was made." Section 10 provides that "the United States court in and for the district wherein the award was made" may vacate an award upon application by a party thereto for specified reasons. GAC asserts (Pet. 19) that the decision below is the first to hold that those venue provisions "limit federal court venue but are not applicable to state courts" (Pet. App. 16a). Even assuming that is so, no court has held to the contrary, and the issue obviously does not have the kind of general importance that might warrant review by this Court.[24] In fact, similar arguments by GAC based upon the quoted language of §§ 9 and 10 have been rejected in prior litigation between the parties, and the decision below accords with general principles established by this Court concerning the application of venue provisions of federal statutes.

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given to a prior arbitration decision (see 480 F. Supp. at 565, 567), rather than the *res judicata* effect of a prior judicial determination. In both of those cases, the *res judicata* issues arose in connection with the merits of the underlying dispute, rather than in connection with issues of arbitrability.

[24]The cases cited by GAC (Pet. 20) involved the venue of federal district courts and did not involve the venue of state courts or intimate any views in that regard. State courts have the jurisdiction, and indeed the duty, to apply the Federal Arbitration Act in litigation involving contracts subject to that Act. *Commercial Metals Co. v. Balfour, Guthrie & Co., Ltd.*, 577 F.2d 264, 269 (5th Cir. 1978). See, *e.g.*, 13 Wright Miller & Cooper, *Federal Practice and Procedure* § 3569 at 470 n.14 (1975) and cases there cited. Even if the federal courts have independent subject matter jurisdiction, it is concurrent with the jurisdiction of state courts. *Victoria Milling Co. v. Hugo Neu Corporation*, 196 F. Supp. 64 (S.D.N.Y. 1961); *Cocotos Steamship Co. of Panama S.A. v. Hugo Neu Corp.*, 178 F. Supp. 491, 492 (S.D.N.Y. 1959); cf. *Dowd Box Co. v. Courtney*, 368 U.S. 502, 505-08 (1962).

GAC relied on that language of §§ 9 and 10 in its attempts to confirm the arbitration award in the federal and state courts of California. In the federal proceedings, GAC contended that §§ 9 and 10 conferred subject matter jurisdiction on the federal district court in California to review the arbitration awards. The district court and the Ninth Circuit both rejected that argument, agreeing with every other federal court that has decided the issue, that the language sounds in venue rather than subject matter jurisdiction, and this Court denied certiorari.[25] See pp. 11-12 *supra*.

In its California state court confirmation proceeding, GAC contended that § 9 of the Act gave California courts *in personam* jurisdiction over UNC. The California Court of Appeal directed dismissal of GAC's action for lack of *in personam* jurisdiction, but it also concluded that, even if jurisdiction had existed, "the doctrine of *forum non conveniens* would require, at a minimum, a stay of the action here, in order to permit [UNC's] pending action in the Santa Fe district court in New Mexico, in which the arbitration award is challenged, to proceed to judgment." 113 Cal. App. 3d 359, 169 Cal. Rptr. 827.[26] That ruling necessarily rejected GAC's interpretation of § 10 as limiting the venue of

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[25] In its petition to this Court, GAC relied on § 9. See Pet. in No. 81-1221 at 7-8 and compare Brief for Respondent in Opposition in No. 81-1221 at 11-22. GAC repeated those arguments, relying primarily on § 10, in defending its removal of UNC's petitions to vacate the awards, and the U.S. District Court for the District of New Mexico rejected those arguments in remanding to the New Mexico courts. See pp. 12-13 *supra*. Thus, final judgments entitled to *res judicata* effect (Pet. App. 13a) establish that no federal court can vacate or confirm these arbitration awards.

[26] The Court of Appeal continued:

> "Also, even if that action were not pending, the courts of New Mexico are obviously the more suitable forums to determine these issues with which they are intimately familiar. The parties have wasted too much time already in adding to the many forums in which they have litigated the state courts of California." *Id.*

state court proceedings to review arbitration awards, as GAC contended in its unsuccessful petition for certiorari to this Court.[27] See p. 12 *supra*. That ruling was consistent with the decisions of other courts. See *AAACon Auto Transport, Inc. v. Newman*, 77 Misc. 2d 1069, 356 N.Y.S.2d 171, 174-75 (1974), and *AAACon Auto Transport, Inc. v. Feldman*, 77 Misc. 2d 120, 353 N.Y.S.2d 851 (1973), both of which applied the doctrine of *forum non conveniens* in actions under the Federal Arbitration Act, since the venue provisions of that Act do not "by their terms apply to any but the U.S. District Courts." 356 N.Y.S.2d at 174.

Such an interpretation is commanded by *Bainbridge v. Merchants & Miners Co.*, 287 U.S. 278 (1932). That case involved the Jones Act (now 46 U.S.C. § 688), which provides: "Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." This Court, which had previously held that the provision related to venue rather than to subject matter jurisdiction,[28] concluded that it did not control the venue of suits under the Jones Act in state courts, as the correct construction of the provision limits it to the courts of the United States." *Id.* at 280. The Court pointed out (*id.* at 280-81) that:

> "The word 'district' is peculiarly apposite in that relation; but in order to apply it to a state court, whose territory for venue purposes may or may not be designated as a 'district,' an elasticity of interpretation would be required which it does not seem probable Congress had in mind. * * * If the question were more doubtful than we think it is, we should be slow to impute to Congress an intention, if it has the power, to interfere with the statutory

[27] GAC's arguments to this Court in that case are virtually identical in substance to its present arguments (Pet. 19-21). See Pet. in No. 80-2106 at 20-22 and compare Brief for Respondent in Opposition in No. 80-2106 at 22-25.

[28] *Panama R.R. v. Johnson*, 264 U.S. 375, 384-85 (1924). See 287 U.S. at 279 n.1.

provisions of the various states fixing the venue of their own courts. It follows that the venue should have been determined by the trial court in accordance with the law of the state." (Footnote omitted.)

See also, *e.g.*, *Pope v. Atlantic Coast Line Railroad*, 345 U.S. 379, 384 (1953); *Miles v. Illinois Central Railroad*, 315 U.S. 698, 703 (1942).

Since §§ 9 and 10 of the Federal Arbitration Act expressly identify the district courts to which they refer as the "United States" district courts, the inapplicability of those provisions to the venue of state courts follows *a fortiori* from *Bainbridge*. Furthermore, nothing in the legislative history of the Act justifies "imput[ing] to Congress an intention, if it has the power, to interfere with" (287 U.S. at 280-81) the laws of the several states establishing the venue or jurisdiction of their courts.[29]

There is no "anomaly," as GAC contends (Pet. 20 & 21 n.11), in the Arbitration Act's failure to limit the venue of state court proceedings. A party seeking to vacate or confirm an award must still find a court with personal and subject matter jurisdiction. The doctrines of *res judicata* and full faith and credit stand to prevent "judicial rivalry" (Pet. 21), as they do in any other dispute that may be tried in state courts. The only anomaly apparent in this case results from GAC's argument: since the arbitration award cannot be reviewed in federal court and since the California state courts lack *in personam* jurisdiction, GAC's argument leads to the conclusion that no court in the country can

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[29] For the legislative history, see *Sales and Contracts To Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearings on S. 4213 & S. 4214 Before a Subcomm. of the Senate Judiciary Comm.*, 67th Cong., 4th Sess. (Jan. 31, 1923); *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before Subcomms. of the House and Senate Judiciary Comms.*, 68th Cong., 1st Sess. (Jan. 9, 1924); H.R. Rep. No. 96, 68th Cong., 1st Sess. (Jan. 24, 1924); S. Rep. No. 536, 68th Cong., 1st Sess. (May 14, 1924); 65 Cong. Rec. 1931, 11080-82 (1924); 66 Cong. Rec. 984, 2759-62, 3003-04 (1924-25).

review this arbitration award. No authority cited by GAC supports that extraordinary result, and the matter is not worthy of review by this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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APPENDIX

THE FEDERAL ARBITRATION ACT, 9 U.S.C. §§ 1-14 (1976)[1]

§ 1. "Maritime transactions" and "Commerce" defined; exceptions to operation of title

"Maritime transactions," as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce," as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce. (July 30, 1947, ch. 392, 61 Stat. 670, derived from Act Feb. 12, 1925, ch. 213, § 1, 43 Stat. 883.)

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part

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[1] The Federal Arbitration Act was originally enacted by Act of February 12, 1925, ch. 213, 43 Stat. 883. Title 9 of the U.S. Code was enacted by Act of July 30, 1947, ch. 392, § 1, 61 Stat. 669.

thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. (July 30, 1947, ch. 392, 61 Stat. 670, derived from Act Feb. 12, 1925, ch. 213, § 2, 43 Stat. 883.)

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration. (July 30, 1947, ch. 392, 61 Stat. 670, derived from Act Feb. 12, 1925, ch. 213, § 3, 43 Stat. 883.)

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure.

The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof. (July 30, 1947, ch. 392, 61 Stat. 671, derived from Act Feb. 12, 1925, ch. 213, § 4, 43 Stat. 883, amended, Sept. 3, 1954, ch. 1263, § 19, 68 Stat. 1233.)[2]

[2]The Act of Sept. 3, 1954, substituted "United States district court" for "court of the United States" in the first sentence; "Title 28, in a civil action" for "the judicial code at law, in equity" in the first sentence; "the Federal Rules of Civil Procedure" for "law for the service of summons in the jurisdiction in which the proceeding is brought" in the third sentence; and "the Federal Rules of Civil Procedure" for "law for referring to a jury issues in an equity action" in the eighth sentence.

§ 5. Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator. (July 30, 1947, ch. 392, 61 Stat. 671, derived from Act Feb. 12, 1925, ch. 213, § 5, 43 Stat. 884.)

§ 6. Application heard as motion

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided. (July 30, 1947, ch. 392, § 1 Stat. 571, derived from Act Feb. 12, 1925, ch. 213, § 6, 43 Stat. 884.)

§ 7. Witnesses before arbitrators; fees; compelling attendance

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators,

or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States. (July 30, 1947, ch. 292 § 1, Stat. 672, derived from Act Feb. 12, 1925, ch. 213, § 7, 43 Stat. 884, amended, Oct. 31, 1951, ch. 655, § 14, 65 Stat. 715.)[3]

§ 8. Proceedings begun by libel in admiralty and seizure of vessel or property

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award. (July 30, 1947, ch. 392, 61 Stat. 672, derived from Act Feb. 12, 1925, ch. 213, § 8, 43 Stat. 884.)

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time

[3] The Act of Oct. 31, 1951 substituted "United States district court for" for "United States court in and for" and "by law for" for "on February 12, 1925, for."

within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. (July 30, 1947, ch. 392, 61 Stat. 672, derived from Act Feb. 12, 1925, ch. 213, § 9, 43 Stat. 885.)

§ 10. Same; vacation; grounds; rehearing

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration —

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown,

or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators. (July 30, 1947, ch. 392. 61 Stat. 872 derived from Act Feb. 12, 1925, ch. 213, § 10, 43 Stat. 383.)

§ 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration —

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties. (July 30, 1947, ch. 392, 67 Stat. 673, derived from Act Feb. 12, 1925, ch. 213, § 11, 43 Stat. 863.)

§ 12. Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award. (July 30, 1947, ch. 392, 61 Stat. 673, derived from Act Feb. 12, 1925, ch. 213, § 12. 43 Stat. 385.)

§ 13. Papers filed with order on motions; judgment; docketing; force and effect; enforcement

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered. (July 30, 1947, ch. 392, 61 Stat. 673, derived from Act Feb. 12, 1925, ch. 213, § 13, 43 Stat. 886.)

§ 14. Contracts not affected

This title shall not apply to contracts made prior to January 1, 1926. (July 30, 1947, ch. 392. 61 Stat. 673, derived from Act Feb. 12, 1925, ch. 213, § 15, 43 Stat. 886.)

No. 82-1104

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

GA TECHNOLOGIES INC. and
GENERAL ATOMIC COMPANY,

Petitioners,

v.

UNITED NUCLEAR CORPORATION,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of New Mexico

RESPONDENT'S OPPOSITION TO PETITIONERS' MOTION TO SUBSTITUTE PARTY

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February 4, 1983

Although GA Technologies Inc. is not a party to the litigation in the courts below, it has been associated with General Atomic Company (GAC) in the caption to the Petition as one of the "Petitioners," and those "petitioners" have moved that GA Technologies Inc. be substituted "in the place and stead" of GAC "and be permitted to proceed as a petitioner in this proceeding." The grounds for the motion are that GAC, a party to a contract and arbitration awards involved in the underlying litigation, has "transferred essentially all of its business, including, inter alia, its contracts with United Nuclear Corporation [UNC] and the arbitration awards involved in this case to GA Technologies Inc., a newly formed California corporation wholly owned by Gulf Oil Corporation."[1/] GAC's representation does not justify granting the motion.

First, the Rules of this Court -- unlike the Federal Rules of Civil Procedure and of Appellate Procedure -- do not authorize a motion to substitute parties because of a transfer of interest. Rule 40 authorizes a motion to substitute only when a party has died, Rule 40.1, and when a public officer "here in his official capacity dies, resigns, or otherwise ceases to hold office," Rule 40.3.[2/]

1/ GAC is a partnership whose constituent partners are Gulf Oil Corporation and Scallop Nuclear Inc., a subsidiary of the Royal Dutch-Shell Group. Pet. at 1 n.1.

2/ By contrast, Rule 25(c), Fed. R. Civ. P., specifically provides: "In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party" (emphasis added). See also Rule 43(b), Fed. R. App. P. A transferee of interests has no automatic right to substitution under Rule 24(c), Fed. R. Civ. P. The matter is committed to "the sound discretion of the trial court." 3B Moore's Federal Practice ¶ 25.08 at 25-78 (2d ed. 1982); 7A Wright & Miller, Federal Practice and Procedure § 1958 at 664-65 (1972). See, e.g., Prop-Jets, Inc. v. Chandler, 575 F.2d 1322, 1324 (10th Cir. 1978).

Second, even assuming that this Court may have the inherent power to substitute parties in appropriate cases (cf. 28 U.S.C. § 1651), GAC has not demonstrated that substitution is appropriate in this case. The motion does not assert that GAC has been dissolved or is no longer in existence. While the motion asserts that by reason of the transfer to which it refers, GA Technologies Inc. has become "the party in interest," GAC has not supplied the Court with the agreement in question, quoted or described the pertinent provisions, or demonstrated that GAC has ceased to be a party in interest. We are informed and believe that the transfer agreement does not even purport to relieve GAC of its liabilities and obligations for acts occuring prior to the October 1982 transfer. GAC is subject to the judgment below vacating the arbitration awards. Moreover, UNC currently has valid New Mexico judgments, awarding damages and other relief against GAC, which were entered in the litigation invalidating the 1973 Supply Agreement. (See Brief for Respondent in Opposition at 9; Ex. 19; Second Amended Final Judgment, May 17, 1978.) Accordingly, it cannot be determined from the representations in the motion that the substitution of GA Technologies Inc. for GAC -- that is, elimination of GAC as a party -- would not impair UNC's rights under its existing judgments.

Third, the motion does not assert that the interest of GA Technologies Inc. will be less than fully represented by GAC in this Court. Indeed, the traditional rule is that "a pendente lite assignment carries with it an implied license by the assignor for the use of his name in the cause by the assignee to protect the rights assigned," 1 C.J.S., Abatement and Revival § 107 (1936). Nothing in the motion suggests that that rule does not apply and does not fully protect GA Technologies Inc.

Compare Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 407-08 (1964), where the court denied a motion to substitute a party because, inter alia, it had been "permitted as amicus to brief and argue its position. In these circumstances we are not persuaded that [its] admission * * * as a party is necessary at this stage to safeguard any claim either that it has already presented or that it may present in the future course of this litigation."

For the foregoing reasons, the motion to substitute GA Technologies Inc. as a party should be denied.

Respectfully submitted,

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February 4, 1983

No. 82-1104

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GA TECHNOLOGIES INC.,
and GENERAL ATOMIC COMPANY,
Petitioners,

v.

UNITED NUCLEAR CORPORATION,
Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of New Mexico

PETITIONERS' REPLY BRIEF

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TABLE OF AUTHORITIES

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UNITED NUCLEAR CORPORATION,

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On Petition For A Writ Of Certiorari To The Supreme Court Of New Mexico

PETITIONERS' REPLY BRIEF

We have requested review of a state-court decision (1) that, concededly for the first time,[1] gives losing parties in arbitrations conducted under federal law the right to have their requests to vacate the arbitration awards heard by any state court in the country where they can

[1] Respondent quotes our observation that the New Mexico Supreme Court decision is the *first* to hold that the Federal Arbitration Act does not limit state-court venue and then says, "Even assuming that is so, no court has held to the contrary and the issue obviously does not have the kind of general importance that might warrant review by this Court." Br. in Opp. 26. The future of the federal arbitration remedy as a meaningful way of removing a burden from the judiciary is, of course, contingent on whether arbitration awards

establish *in personam* jurisdiction over the prevailing party,

(2) that gives state courts unprecedented authority to decide, *de novo*, legal issues, such as the *res judicata* effect of state-court proceedings, even though the issues have been argued to, and decided by, an arbitration panel constituted under federal law, and

(3) that has construed two constitutional judgments which this Court rendered in earlier stages of this dispute as being entirely ceremonial and totally devoid of substantive significance.

The history of the litigation between UNC and GAC[2] and the fact that this Court, in addition to granting re-

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will be perceived as enforceable. The possibility that a losing party in arbitration could shop for a favorable forum to invalidate the award won by his opponent will be a very significant deterrent to selecting arbitration as a means of resolving disputes. On this issue, therefore, the decision is of enormous "general importance."

[2] Although we believe that all of the history is not material to the issues presented in the petition, the components of that history are as follows:

1. The New Mexico courts twice illegally enjoined arbitration and while arbitration was illegally enjoined proceeded to resolve arbitrable issues.
2. This Court in *Felter I* and *Felter II* declared the injunctions unconstitutional and ruled that the New Mexico courts could not interfere with GAC's right to seek arbitration.
3. UNC sought to have the arbitration enjoined in federal court but the court ruled that UNC should present its *res judicata* claims to the arbitrators for resolution.
4. UNC and GAC selected an arbitration panel in accordance with their agreement to arbitrate. UNC presented its *res judicata* claims to the panel and told the panel that the "sig-

view on two occasions, has also turned down several requests by GAC for review at other junctures are irrelevant to the three issues presented in our petition. The legitimacy of the New Mexico forum, the legality of the standard of review it applied, and the correct meaning of this Court's *Felter I* and *Felter II* decisions can and should be resolved by this Court without dissecting all the steps taken by the parties in lower courts. The legal issues presented in our petition may not only be simply and succinctly stated, but they can be straightforwardly resolved.

In its efforts to evade review by this Court of the New Mexico court's decision, respondent takes refuge not only in the allegedly intricate history of the litigation but in surprising misrepresentations of fact and erroneous assertions of law.

First, respondent repeatedly seeks to convey the totally false impression that GAC deliberately bypassed

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nificance" of *Felter II* was that the panel had the "power" to resolve the *res judicata* issue.

5. The panel issued two awards in San Diego, California. In the first award, the panel ruled that prior judgments of the New Mexico courts were not *res judicata*. The panel then ruled that GAC had not waived its right to arbitrate, that the underlying agreement was not void, and that GAC was entitled to damages and specific performance.

6. UNC took the California awards back to New Mexico state court and the court, at UNC's request, vacated at least the second award. The court resolved the *res judicata* question *de novo*, refused to review the arbitrators' decision on that issue under the standards of Section 10 of the Federal Arbitration Act and vacated the remainder of the panel's decisions on the basis that the panel had been deprived of all power by those earlier judgments of the New Mexico courts.

arbitration and willingly sought, instead, to litigate its dispute with UNC in the New Mexico courts. Br. in Opp. 3, 4, 17, 21. We are criticized for giving "no record citation" for our assertion that "GAC formally expressed its intention to arbitrate with UNC" before it filed an answer and before the entry in April 1976 of the preliminary injunction which forbade arbitration. Br. in Opp. 3 n.3. However, the arbitration panel specifically addressed these issues and ruled against UNC with copious reference to facts which "are not disputed." Pet. App. D, pp. 60a-66a. In addition, we reproduce as Appendices I-III hereto the various pleadings filed by GAC before April 2, 1976 (the date of the unconstitutional injunction struck down in *Felter I*), in which the right to arbitrate was explicitly reserved. We also reproduce as Appendix IV an affidavit by an employee of GAC, filed in opposition to UNC's request for a preliminary injunction, that stated (p. 10a):

> GAC will also seek to join UNC or have UNC joined in lawsuits and arbitration proceedings brought by the power companies.

The following day, UNC's counsel advised the Santa Fe court that GAC "is going to bring us [UNC] into this arbitration if it is not enjoined" and urged that court to enter such an injunction. Transcript of Proceedings, March 24, 1976, p. 38. That relief was granted on April 2, 1976.

We are amazed that UNC could assert, in light of the uncontested documents in this record, which included two successful appeals to this Court, that GAC's filing on November 30, 1977, of a motion to stay the New Mexico trial came "finally . . . after almost two years of intensive

litigation." Br. in Opp. 17.[3] Contrary to the suggestion that GAC slept on its arbitration rights, GAC vigorously sought reversal on appeal of the illegal state-court injunction that prohibited arbitration (and thus limited GAC to litigation in the state court) during the entire period it was in effect. Indeed, the final month of the delay occurred because UNC successfully opposed the lifting of the injunction even after this Court had declared it illegal, on the ground that the trial court had not received a mandate. GAC filed its demand for arbitration in California one day after the injunction was finally vacated by the trial court, and the motion for a stay was submitted on the next day. Arbitration was anything but a belated afterthought.[4]

Second, UNC claims that the limited judicial review of arbitration awards permitted by Section 10 of the Federal Arbitration Act does not apply to the legal issue whether

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[3] The same false impression is conveyed by the assertion on page 4 of the Brief in Opposition that GAC did not request a stay from the trial court in April 1976, "rather, it continued to litigate in the New Mexico courts for more than 19 months before demanding arbitration under the 1973 Supply Agreement and moving for a stay of court proceedings pending such arbitration." UNC surely knows that, by reason of the then outstanding court order, GAC had no choice but to "continue" with the litigation in New Mexico. Arbitration and any other proceeding outside New Mexico were flatly forbidden.

[4] UNC's argument that "GAC had no basis to complain about the New Mexico court's exercise of jurisdiction prior to the filing of a timely motion for a stay of proceedings pursuant to § 3 of the Federal Arbitration Act" (Br. in Opp. 17) is disingenuous. UNC knows that it would have been entirely pointless to request the Santa Fe court to stay its proceedings under Section 3 in order to permit arbitration when this same court had entered an injunction prohibiting arbitration. GAC could not demand arbitration outside New Mexico (to which it was entitled under the Federal Arbitration Act) so long as it was enjoined from doing so by the New Mexico court.

a party has waived its right to arbitrate. UNC classifies that decision as an issue of "arbitrability," which, it says, is for a court and not for arbitrators to decide. Br. in Opp. 21-24. However, as the cases cited by UNC (Br. in Opp. 24) indicate, "arbitrability" refers to the *scope* of the arbitration clause—*i.e.*, whether a particular dispute comes within those which the parties have agreed to arbitrate. *Domke on Commercial Arbitration*, § 12.01, at 99 (1968). Whether one of the parties has waived the right to arbitrate does not present an issue of "arbitrability," and judicial authorities establish that questions of waiver are for arbitrators. For example, the issue in *International Union of Operating Engineers* v. *Flair Builders*, 406 U.S. 487 (1972), was whether arbitration was barred by laches, and this Court held that the question was suitable for resolution by the arbitrators and should be decided by them. *Accord, World Brilliance Corp.* v. *Bethlehem Steel Co.*, 342 F.2d 362, 364-65 (2d Cir. 1965) (holding that a dispute as to waiver was properly submitted to arbitration); *Domke, supra*, § 19.01, at 182 ("Usually, it is for the arbitrator to determine whether a party has waived his rights under an arbitration clause").[5]

By the same token, the legal *res judicata* issue was correctly presented to the arbitrators, and their decision was binding. Contrary to UNC's representation (Br. in Opp. 25, n.23), the Court of Appeals for the Second Circuit *did* hold in *Boston & Maine Corp.* v. *Illinois Central Railroad Co.*, 396 F.2d 425 (2d Cir. 1968), *aff'g* 274 F. Supp. 257 (S.D.N.Y. 1967), that the arbitrators' decision

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[5] To the extent that *N & D Fashions, Inc.* v. *DHJ Industries, Inc.*, 548 F.2d 722, 728-29 (8th Cir. 1972) (cited in Br. in Opp. 22 n.18), conflicts with *Flair Builders* and *World Brilliance*, the conflict of decisions provides an additional ground for review.

on a *res judicata* question is conclusive for a reviewing court, irrespective of the court's own view of the law. Moreover, there can be no question of the power of the arbitrators to make an award on the *res judicata* issue. That was the "significance of" *Felter II*, as UNC has admitted, and two federal district courts confirmed that power. *See* Petition, pp. 15, 17 n.9. In conclusion, in this case, the arbitration clause "was clearly broad enough to cover the defense of waiver," *World Brilliance Corp.* v. *Bethlehem Steel Co.*, *supra*, 342 F.2d at 364, as well as UNC's *res judicata* claims. The arbitrators' ruling on these issues is thus subject only to very limited review.[6]

Finally, UNC is unable to suggest any way in which the meaning given to *Felter I* and *Felter II* by the court below (and by UNC) ascribes any substantive consequence whatever to those decisions. We noted in our petition—and it is confirmed by the lack of a response in

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[6] The New Mexico court's finding that antitrust issues are not arbitrable does not render the entire contract dispute between UNC and GAC nonarbitrable. Claims under state (as opposed to federal) antitrust and securities acts are subject to federal arbitration. *Romnes* v. *Bache & Co.*, 439 F. Supp. 833 (W.D. Wis. 1977); *Barron* v. *Tastee Freez Int'l, Inc.*, 482 F. Supp. 1213, 1216-17 (E.D. Wis. 1980). *See Allison* v. *Medicab International, Inc.*, 92 Wash. 2d 199, 597 P.2d 380 (1979) (Federal Arbitration Act requires arbitration of claims under state franchising statute notwithstanding state law making such claims nonarbitrable). In addition, the arbitrators in this case noted that the mere assertion of an antitrust defense by a party to an arbitration clause cannot automatically bar the arbitration. "Such a result would render contractual arbitration clauses meaningless, and would frustrate state and federal arbitration statutes" (Pet. App. D, p. 109a). The arbitrators went on to discuss UNC's alleged "antitrust claim" and to conclude that UNC's antitrust allegations were so totally lacking in substance that they did not even meet the minimal standard of whether there was a *bona fide* antitrust claim. Pet. App. D, pp. 110a-113a.

UNC's Brief in Opposition—that if the New Mexico court is right, *Felter I* and *Felter II* have now been reduced to empty formalisms. In UNC's view, these constitutional rulings gave GAC a right which was devoid of meaning even before *Felter II* was decided. This view suggests that this Court took the effort to issue these decisions for no purpose whatever. As the arbitrators concluded, however, *Felter I* and *Felter II* should not be treated as "meaningless gestures." Pet. App. D, p. 59a. To be sure, this Court has denied petitions for certiorari filed by GAC which cited the prospect that *Felter I* and *Felter II* would be deprived of effect if the New Mexico courts persisted in reading those decisions narrowly. But not until the New Mexico Supreme Court actually wiped away the arbitration award which resulted from *Felter I* and *Felter II* did it become unequivocally clear that *Felter I* and *Felter II* have been robbed of all content. This Court

should grant certiorari to reverse the frustration of its mandate.

Respectfully submitted,

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FEBRUARY 1983

APPENDIX I

[Filed February 23, 1976]

STATE OF NEW MEXICO COUNTY OF SANTA FE
IN THE DISTRICT COURT

No. 50827

UNITED NUCLEAR CORPORATION,
a Delaware corporation,

Plaintiff,

v.

GENERAL ATOMIC COMPANY, a partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc.,

Defendant.

MOTION TO DISMISS

Defendant General Atomic Company, by and through its attorneys, moves the Court to quash service had on this defendant and to dismiss all counts and causes of action stated in the Complaint for lack of personal jurisdiction over the defendant, without waiving its right to demand arbitration on all causes and issues raised by United Nuclear Corporation herein. Proper service upon defendant under the New Mexico longarm statute, or other service and process statutes of New Mexico, has not been made. An Affidavit is attached hereto.

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/s/ By Wm. Federici
Attorneys for Defendant

APPENDIX II

[Filed February 23, 1976]

STATE OF NEW MEXICO COUNTY OF SANTA FE
IN THE DISTRICT COURT

No. 50827

UNITED NUCLEAR CORPORATION,
a Delaware corporation,
Plaintiff,

v.

GENERAL ATOMIC COMPANY, a partnership composed of
Gulf Oil Corporation and Scallop Nuclear, Inc.,
Defendant.

MOTION FOR PROTECTIVE ORDER

Comes now the defendant, General Atomic Company, by and through its attorneys, and moves this Court for a protective order staying the defendant's filing of answers or objectives to those interrogatories posed herein by plaintiff, without waiving its right to demand arbitration on all causes and issues raised by United Nuclear Corporation herein, on the grounds that jurisdiction in this cause is at issue and strongly contested by defendant; that the Court has set March 5, 1976, for a hearing on its jurisdiction herein; and that to cause defendant to answer or object to interrogatories prior to such determination would be unduly oppressive and burdensome and quite

possibly be needless, and such delay does not adversely affect the plaintiff herein.

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APPENDIX III

[Filed March 9, 1976]

STATE OF NEW MEXICO COUNTY OF SANTA FE
IN THE DISTRICT COURT

NO. 50827

UNITED NUCLEAR CORPORATION,
a Delaware corporation,

Plaintiff,

v.

GENERAL ATOMIC COMPANY, a partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc.,

Defendant.

MOTION TO DISMISS

Comes now the defendant, General Atomic Company, by and through its attorneys, and moves this Court to dismiss this cause of action for the failure to join certain parties under the requirements of Rule 19 of the New Mexico Rules of Civil Procedure, without waiving its right to demand arbitration on all causes and issues raised by United Nuclear Corporation herein, and as grounds therefor states and alleges that Duke Power Company, a North Carolina corporation, Indiana & Michigan Electric Company, an Indiana corporation, Detroit-Edison Company, a Michigan corporation, and Commonwealth Edison Company, an Illinois corporation are parties whose joinder in this suit is necessary to assure just adjudication of all claims and issues alleged by plaintiff herein.

Wherefore, defendant General Atomic Company prays that this action be dismissed or that the Court order the joinder of such parties in this action.

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/s/ By Frank Andrews
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APPENDIX IV

[Filed March 23, 1976]

AFFIDAVIT

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

A. A. H. KOCH, being first duly sworn, upon information and belief states and alleges:

1. I am Manager, Special Projects, Uranium and Light Water Fuel Division of General Atomic Company ("GAC").

2. I am an attorney, admitted to practice in the State of California. During the period from September 1971 to December 1973, I was counsel for Gulf United Nuclear Fuels Corporation ("GUNF"), and as such was responsible for all legal matters of that company.

3. I am familiar with all of the circumstances involved in the suit, United Nuclear Corporation vs. General Atomic Company, No. 50827, filed in Santa Fe County, New Mexico. I am familiar with the 1973 Uranium Supply Agreement (Exhibit 5 to the Complaint in the above action). I am also familiar with the five agreements with four power companies which form the basis of the 1973 Uranium Supply Agreement. These agreements were originally made between United Nuclear Corporation ("UNC") and the power companies and confirmed either with formal contracts in the case of the two Commonwealth Edison Company ("Commonwealth") agreements and the Indiana and Michigan Electric Company ("I&M") agreement or with informal letter agreements in the case of the Duke Power Company ("Duke") agreement and the Detroit Edison Company ("Detroit Edison") agreement. All five of these agreements were subsequently assigned to GUNF and later to GAC, and are referred to in that agreement and hereinafter as the "UNC Agreements." Those agreements, the original

commitment dates, the names of the power companies involved, the approximate quantities of uranium involved, and the assignment process under which GAC became involved in the agreements are all indicated on Attachment 1 to this Affidavit.

4. UNC is obligated pursuant to Article IV (Attachment 2 hereto) of the 1973 Uranium Supply Agreement to supply a described quantity of uranium (about eight million pounds) if and to the extent GAC is required to supply such quantities to the four power companies pursuant to the UNC Agreements.

5. In May 1975, UNC failed to deliver 500,000 pounds to American Electric Power Service Corporation ("AEP") as scheduled pursuant to the 1973 Uranium Supply Agreement and the I&M agreement. UNC has continued to refuse to deliver this quantity despite I&M's demands for delivery. I&M claims that the I&M fuel agreement requires the supply of said 500,000 pounds of uranium. This quantity is Requirements Uranium under the 1973 Uranium Supply Agreement, and with respect to Requirements Uranium the 1973 Uranium Supply Agreement requires UNC to supply the quantity of uranium which GAC is required to supply pursuant to the I&M fuel agreement. (See Attachment 2.)

7. In September 1975, UNC made a 67,000 pound delivery to GAC for Commonwealth as called for by the terms of the 1973 Uranium Supply Agreement and the Commonwealth Dresden agreement.

8. In December 1975, UNC failed to deliver 385,000 pounds of uranium to Duke as scheduled. UNC has continued to refuse to deliver this quantity despite Duke's demands for delivery of the material. Duke claims that delivery of this quantity in December 1975 was required by the terms of the Duke fuel agreement. This quantity is Requirements Uranium under the 1973 Uranium Supply Agreement, and with respect to Requirements Uranium the 1973 Uranium Supply Agreement requires UNC to supply the quantity of uranium which

GAC is required to supply pursuant to the Duke fuel agreement.

9. In February 1976, UNC failed to deliver 391,000 pounds of uranium to GAC as scheduled pursuant to the 1973 Uranium Supply Agreement and the I&M fuel agreement. This quantity of uranium is needed immediately for fabrication by GAC's subcontractor of fuel assemblies scheduled to be delivered to I&M in December 1975.

10. As the result of the failure of UNC to make the deliveries to I&M and to GAC for use in I&M fuel assemblies, I&M has filed suit against Gulf Oil Corporation ("Gulf") and Gulf and Scallop Nuclear Inc. doing business as GAC.

11. As a result of UNC's failure to make delivery to Duke, Duke has demanded arbitration pursuant to an arbitration provision of the Duke fuel agreement.

12. Communications from Detroit Edison and Commonwealth have caused us to believe that these companies are also contemplating legal action against GAC if UNC continues to fail to make deliveries pursuant to the 1973 Uranium Supply Agreement and the UNC Agreements.

13. The agreements for the supply of this uranium were originally made between the four power companies and UNC. The power companies, UNC and GAC have during all relevant periods contemplated that the uranium to be supplied under the UNC Agreements (except for half of the Duke first core material) would be supplied by UNC. Commonwealth has never released UNC from UNC's original obligation to Commonwealth under the Dresden and LaSalle Contracts. I&M has never released UNC from UNC's original obligations to I&M under the I&M fuel agreement. UNC has guaranteed performance on all of the UNC Agreements.

14. With respect to the quantity of uranium defined in the 1973 Uranium Supply Agreement as "Requirements Uranium" (the first approximately one-third of the uranium covered by the 1973 Uranium Supply Agreement), UNC's obliga-

tions to GAC are the same as GAC's uranium supply obligations (except for one-half of the Duke first core uranium) to the power companies (Article IV of the 1973 Uranium Supply Agreement—Attachment 2).

15. Many disputes have arisen regarding these uranium supply obligations and more are expected to arise. This is primarily because the current market price of uranium is generally about three to five times the prices referred to in the agreements. UNC has indicated (1) that UNC's performance as required by the UNC Agreements is excused as having been rendered commercially impracticable; (2) that UNC's performance under at least one of the UNC Agreements is excused based on the power company's fraud; (3) that UNC is entitled to price increases under the terms of the UNC Agreements; (4) that deliveries should be delayed pursuant to the terms of the UNC Agreements; and (5) that the quantities that the power companies are demanding are in excess of the quantities called for by the agreement. The power companies argue (1) that performance is not excused for reasons of commercial impracticability; (2) that performance is not excused for any reason; (3) that delivery at the prices referred to in the contract is required; (4) that deliveries should not be delayed; and (5) that the quantities demanded are the quantities to which the power companies are entitled. Some of the specific legal issues which are being or may be raised both by the power companies and UNC are described in Attachment 3 hereto.

16. If GAC is required to litigate the same legal issues in one forum with UNC and in different forums with the power companies, there is a possibility of inconsistent results. The losses to GAC resulting from some of these potential inconsistent results are shown in Attachment 3. The total potential loss to GAC could be in excess of $500 million.

17. Because of this, GAC has sought to join the power companies and UNC together for the resolution of these legal and factual issues. It is for this reason that GAC brought the interpleader action in the Federal District Court for the Dis-

trict of New Mexico. Even though this action, had it been successful, would have probably stayed all other lawsuits relating to the subject matter, thereby greatly reducing litigation expense and effort, UNC (as well as the power companies) opposed the jurisdiction of the Federal Court. GAC's desire to avoid inconsistent results is the primary purpose for GAC's seeking to require the joinder of the power companies in the Santa Fe lawsuit. Again, for the purpose of avoiding inconsistent results, GAC will also seek to join UNC or to have UNC joined in lawsuits and arbitration proceedings brought by the power companies. UNC is already a party in the arbitration demand filed on October 29, 1974, by Commonwealth regarding the LaSalle Contract.

18. Specifically, GAC plans to seek the joinder of UNC in the lawsuit filed on February 24, 1976, by I&M in the United States District Court for the Southern District of New York. GAC also expects to seek the participation of UNC in the arbitration proceeding demanded by Duke on February 13, 1976.

19. The joinder of UNC in these proceedings would not be for the purpose of subjecting UNC to vexatious, oppressive and multiple litigation, but would be for the purpose of avoiding inconsistent results as between GAC and its customers and as between GAC and its supplier.

Executed at San Diego, California this 22nd day of March 1976:

/s/ A. A. H. Koch
A. A. H. Koch

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No. 82-1104

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

GA TECHNOLOGIES INC.,
and GENERAL ATOMIC COMPANY,

Petitioners,

v.

UNITED NUCLEAR CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court of New Mexico

PETITIONERS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO SUBSTITUTE PARTY

Between the time of the decision of the New Mexico Supreme Court in this action and the filing of the petition, petitioner General Atomic Company transferred the assets relevant to this litigation to a newly-formed corporation, GA Technologies Inc. Because of UNC's long history of using procedural devices to frustrate and delay the exercise of GAC's federal rights, we wished to avoid any possible dispute as to whether the proper party was before this Court. Accordingly, we advised the Court of the transfer of assets, filed the petition on behalf of both GAC and GA Technologies Inc., and requested that the real party-in-interest, GA Technologies Inc., be substituted as the petitioner.

UNC has now opposed the proposed substitution on various grounds. We continue to believe (for the reasons set forth in our motion) that this Court has authority to entertain a motion to substitute parties, and that the real party-in-interest, GA Technologies Inc., is the proper party in this

Court. However, for purposes of this proceeding, our concern has always been to assure that the Court is aware of the transfer of interest and that its consideration of the issues presented by this case is not complicated by disputes as to the identity of the parties. Unless there is no doubt that GAC will be allowed to represent fully the interests of GA Technologies Inc. in this Court (see Opp., p. 2), the Court should grant the motion to substitute or, if necessary to accommodate UNC's alleged concerns, add GA Technologies Inc. as an additional party.

Respectfully submitted,

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